CLD-155

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1637

WILLIAM PLUMMER,
Appellant

v.

WELLPATH; CORRECT CARE SOLUTIONS; DR. ROBERT MAXA; CHCA KIM SMITH; RNS GARY PRINKEY; DR. BARRY EISENBERG; CRNP ANDREW LESLIE; RN ESSONNO; DR. DANIEL WECHT; DR. RICHARD WILLIAMSON; SUPERINTENDENT OVERMEYER; DORINA VARNER; ASSISTANT KERI MOORE; JOSEPH SILVA, Director of Health Service; CRNP WILLIAM SUTHERLAND; SUPERINTENDENT DEREK OBERLANDER

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 1-22-cv-00039)
District Judge: Honorable Susan Paradise Baxter

Submitted for Possible Dismissal Pursuant to 28 U.S.C. § 1915(e)(2)(B) or
Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6
June 8, 2023

Before: SHWARTZ, MATEY, and FREEMAN, Circuit Judges

APPENDIX A

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Western District of Pennsylvania and was submitted for possible dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B) and for possible summary action pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6 on June 8, 2023.

On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that the judgment of the District Court entered March 13, 2023, be and the same hereby is affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

DATED: June 26, 2023

Certified as a true copy and issued in lieu
of a formal mandate on September 5, 2023

Teste: Patricia S. Dodszuweit
Clerk, U.S. Court of Appeals for the Third Circuit

CLD-155 **NOT PRECEDENTIAL**

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(Opinion filed: June 26, 2023)

OPINION*

PER CURIAM

William Plummer, proceeding pro se, appeals from the District Court's order granting defendants' motions to dismiss. We will summarily affirm.

Plummer, a state inmate currently housed at SCI-Coal Township, sued numerous defendants, including Department of Corrections ("DOC") administrators, SCI-Forest's medical service provider, employees of the medical service provider, and two independent physicians, pursuant to 42 U.S.C. § 1983. Plummer alleged that, while he was housed at SCI-Forest, all defendants violated the Eighth Amendment in failing to adequately treat his serious back issues, and the medical defendants committed medical malpractice under state law. Dkt. No. 68 at 19. He sought injunctive, compensatory, and punitive relief. *Id.* at 19–20.

The District Court granted Plummer leave to file a supplement to his amended complaint, Dkt. Nos. 147 & 149, and all defendants filed motions to dismiss, Dkt. Nos. 84, 105, 109, 121. A Magistrate Judge recommended granting the motions as to Plummer's Eighth Amendment claims, dismissing the Eighth Amendment claims with

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

prejudice, and declining to exercise supplemental jurisdiction over his state law claims.[1] Dkt. No. 172. Plummer then filed a motion for leave to further supplement his amended complaint to add new defendants. Dkt. No. 185. The District Court, over Plummer's objections, adopted the Magistrate Judge's recommendation in its entirety. Dkt. No. 189. The Court denied Plummer's motion to supplement without prejudice to his ability to bring a new suit against the new defendants in the appropriate jurisdiction. *Id.* Plummer filed this timely appeal. Dkt. No. 194.

We have jurisdiction under 28 U.S.C. § 1291.[2] We exercise plenary review over the dismissal of the complaint. *Chavarriaga v. N.J. Dep't of Corr.*, 806 F.3d 210, 218 (3d Cir. 2015). Upon review, we will affirm because no substantial question is presented on appeal. *See* 3d Cir. L.A.R. 27.4.

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[1] One of the independent physicians filed a motion for summary judgment as to Plummer's state law claim, which the Magistrate Judge recommended the Court dismiss as moot. Dkt. Nos. 143 & 172 at 36 n.6.

[2] This Court has jurisdiction over this appeal even though a without-prejudice dismissal generally is neither final nor appealable. *See Borelli v. City of Reading*, 532 F.2d 950, 951 (3d Cir. 1976) (per curiam). In declining to exercise supplemental jurisdiction, the District Court dismissed Plummer's state law claims without prejudice to Plummer's ability to bring those claims in state court. Dkt. No. 189 at 21. Because Plummer cannot cure the lack of original subject matter jurisdiction, *Borelli* does not preclude the Court's review. *See id.* at 951–52; *cf. Pa. Fam. Inst., Inc. v. Black*, 489 F.3d 156, 162 (3d Cir. 2007) (per curiam) ("*Borelli* does not apply 'where the district court has dismissed based on justiciability and it appears that the plaintiffs could do nothing to cure their complaint.'") (citation omitted).

The District Court properly dismissed Plummer's Eighth Amendment claims against the medical defendants. As Plummer recounted, his medical providers addressed his serious medical condition for seven years prior to the filing of his complaint, during which they responded to his sick calls, prescribed him medication, and conducted examinations and tests. *White v. Napoleon*, 897 F.2d 103, 108–09 (3d Cir. 1990) ("Only 'unnecessary and wanton infliction of pain' or 'deliberate indifference to the serious medical needs' of prisoners are sufficiently egregious to rise to the level of a constitutional violation.") (citations omitted). Plummer's mere disagreement with his medical care does not state an Eighth Amendment claim.[3] *Id.* at 110.

The District Court also correctly dismissed Plummer's Eighth Amendment claims against the DOC administrators for lack of personal involvement. Although Plummer alleged that these defendants had knowledge of his medical treatment because they received and reviewed his medical records and grievances, such actions do not establish personal involvement.[4] *See Rode v. Dellarciprete*, 845 F.2d 1195, 1207–08 (3d Cir. 1988).

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[3] The District Court properly dismissed Plummer's claims against the medical service provider because he failed to allege any facts about a policy or practice implicating the corporation, as required to hold a private corporation liable under § 1983. *Natale v. Camden Cnty. Corr. Facility*, 318 F.3d 575, 583–84 (3d Cir. 2003).

[4] Despite Plummer's objections, the District Court also correctly concluded that, given the defendants' motions to dismiss, the Magistrate Judge properly denied Plummer's requests to compel the production of documents. *See Ashcroft v. Iqbal*, 556 U.S. 662,

The District Court did not abuse its discretion in dismissing Plummer's Eighth Amendment claim with prejudice because amendment was futile. *See Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir. 2002). The Court also did not abuse its discretion in denying without prejudice Plummer's motion to supplement based on futility, as all the defendants Plummer sought to add should be named in a separate lawsuit in the proper federal jurisdiction. *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997). Finally, as Plummer failed to state a claim under federal law, the District Court acted within its discretion in declining to exercise jurisdiction over supplemental state law claims.[5] *See Doe v. Mercy Cath. Med. Ctr.*, 850 F.3d 545, 567 (3d Cir. 2017).

Accordingly, we will affirm the judgment of the District Court.

685–86 (2009); *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("The purpose of [Rule] 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints without subjecting them to discovery.").

[5] Given the decision not to exercise supplemental jurisdiction, the District Court properly dismissed the independent physician's motion for summary judgment on Plummer's state law claim without prejudice to the physician's ability to assert the motion in state court.

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(M.D. PA No. 1-22-cv-00039)

SUR PETITION FOR REHEARING

Present: CHAGARES, *Chief Judge*, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, and CHUNG, *Circuit Judges*

The petition for rehearing filed by Appellant in the above-captioned case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

APPENDIX (D)

By the Court,

s/ Arianna J. Freeman
Circuit Judge

Dated: August 28, 2023
Tmm/cc: William Plummer
All Counsel of Record

UNITED STATES COURT OF APPEALS
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By the Court,

s/ Arianna J. Freeman
Circuit Judge

Dated: August 28, 2023
Tmm/cc: William Plummer
All Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM PLUMMER,	)	
	)	
Plaintiff,	)	**Case No. 1:22-cv-39-SPB-RAL**
	)	
v.	)	
	)	
WELLPATH, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM ORDER

This *pro se* civil action was opened on February 10, 2022 and referred to United States Magistrate Judge Richard A. Lanzillo for pretrial proceedings in accordance with the Magistrate Judges Act, 28 U.S.C. §636(b)(1), and Local Civil Rule 72(b). ECF No. 1. The Plaintiff, William Plummer, is an inmate formerly housed at the State Correctional Institution at Forest ("SCI-Forest"). His amended complaint, the operative pleading, was filed on July 25, 2022. ECF No. 68. Plaintiff later attempted (unsuccessfully) to further amend his claims, and his proposed second amended complaint, though not accepted as such, has been docketed at ECF No. 147 and construed as a supplement to the amended complaint. *See* ECF Nos. 119, 120. Together, these pleadings (collectively referred to as the "Amended Complaint") set forth federal and state claims against the following fourteen individuals and two corporations, *to wit*: Correct Care Solutions, WellPath, Barry Eisenberg, Andrew Leslie, Robert Maxa, and William Sutherland (collectively referred to herein as "Medical Defendants"); Jeanne Essono, Keri Moore, Derek Oberlander, Superintendent Overmeyer, Gary Prinkey, Joseph Silva, Kim Smith, and Dorina Varner (collectively, the "DOC Defendants"); Daniel Wecht, and Richard Williamson. At bottom, Plaintiff claims that these various Defendants committed medical

APPENDIX (B) of District Judge

malpractice and/or violated his Eighth Amendment rights by displaying deliberate indifference to his serious medical needs.

Pending before the Court are motions to dismiss filed by: Daniel Wecht ("Wecht"), ECF No. 84; Richard Williamson ("Williamson"), ECF No. 105; the Medical Defendants, ECF No. 109; and the DOC Defendants, ECF No. 121. These motions have been briefed and are now ripe for resolution. Also pending in this case is a motion by Wecht for summary judgment on Plaintiff's state law claim, ECF No. 143, and a motion by the Medical Defendants to strike Plaintiff's certificate of merit, ECF No. 170. Finally, there is a recently filed motion by Plaintiff for leave to supplement his Amended Complaint. ECF No. 185.

On January 3, 2023, Magistrate Judge Lanzillo issued an omnibus Report and Recommendation ("R&R"). ECF No. 172. Therein, he opined that this Court should grant Defendants' Rule 12(b) motions in part and dismiss Plaintiff's Eighth Amendment deliberate indifference claims with prejudice. Judge Lanzillo also recommended that this Court decline to exercise supplemental jurisdiction over Plaintiff's state law medical malpractice claims and allow Plaintiff to pursue that aspect of his case in state court. Finally, Judge Lanzillo recommended that Defendant Wecht's motion for summary judgment on the state law claims be dismissed as moot. The Magistrate Judge made no recommendations concerning the Medical Defendants' motion to strike or Plaintiff's recent motion for leave to supplement his pleadings.

Judge Lanzillo's recommendation to dismiss the Eighth Amendment claims rests on a series of legal determinations. As to Defendants Silva and Smith, Judge Lanzillo found no averments in the Amended Complaint (including Plaintiff's supplemental pleading) that set forth their alleged misconduct; thus no basis of liability had been pled. With respect to Defendants Overmeyer, Oberlander, Varner, and Moore, Judge Lanzillo perceived that their only alleged

involvement in this case was through the prison grievance process, which did not constitute grounds for Eighth Amendment liability. As to Defendants Essono and Prinkley, Judge Lanzillo found that Plaintiff had failed to plead their deliberate indifference to a serious medical need.

Turning to the Medical Defendants, Judge Lanzillo first concluded that no basis for *Monell* liability had been pled against WellPath or Correct Care Solutions. Next, Judge Lanzillo found that almost all the claims against the individual Medical Defendants were barred by the applicable two-year statute of limitations. One noteworthy exception pertained to Plaintiff's interaction with CRNP Leslie on March 21, 2022. But as to this incident and all others allegedly giving rise to an Eighth Amendment violation, Judge Lanzillo found that the facts pled did not establish any Medical Defendant's deliberate indifference to a serious medical need.

The Magistrate Judge next considered the Eighth Amendment claims against Defendants Wecht and Williamson. Judge Lanzillo opined that Plaintiff could not establish either Defendant's liability under 42 U.S.C. §1983 because neither Wecht nor Williamson was alleged to be a state actor. In addition, Judge Lanzillo noted that Plaintiff had not responded to Williamson's motion to dismiss; therefore, he deemed Williamson's motion unopposed. Insofar as Plaintiff was alleging a conspiracy involving Defendant Williamson, Judge Lanzillo also found that such conspiracy had been insufficiently pled.

Having determined that Plaintiff failed to state a viable §1983 claim, Judge Lanzillo recommended that the §1983 claims be dismissed with prejudice, as he considered further amendment to be futile. As noted, he recommended that the remaining claims under Pennsylvania law be dismissed without prejudice so that Plaintiff could litigate them in the appropriate state forum.

Objections to the Report and Recommendation were due to be filed no later than January 20, 2023, but that deadline was later extended to February 21, 2023. ECF Nos. 172, 176. Plaintiff filed timely objections on February 13, 2023. ECF No. 180. On February 21, 2023, the Court received Plaintiff's response to Williamson's motion to dismiss. ECF No. 181.[1] That same day, the Court received Plaintiff's "Motion to Fully Incorporate Plaintiff's Objections Filed on or about January 17th, 2023, with Plaintiff's Perfected Objections Herein" ("Motion to Incorporate"), along with a supporting Memorandum. ECF Nos. 183, 184. By separate order, the undersigned granted Plaintiff's "Motion to Incorporate" his "perfected" objections into his original objections. See ECF No. 188. Accordingly, the Court has fully considered all of Plaintiff's filings in response to the Magistrate Judge's Omnibus Report and Recommendation, as set forth at ECF Nos. 180, 181, 182, and 183. The Court has also reviewed Plaintiff's recently filed motion for leave to further supplement his pleading. ECF No. 185. Finally, the Court has received and reviewed the responses to Plaintiff's objections that have been filed by Dr. Williamson and the Medical Defendants. ECF Nos. 184, 187. Based on its *de novo* review of these various submissions, the Court finds that the Magistrate Judge's recommendations are well-taken and that Plaintiff's objections lack merit. We address the §1983-related objections below.

[1] Plaintiff filed a motion on February 2, 2023 requesting leave to file "another" response to Williamson's Rule 12(b) motion. *See* ECF No. 178. In his motion for leave, Plaintiff produced copies of cash slips showing that he had previously mailed his response to Williamson's motion in a timely manner. *See* ECF No. 178-1. Plaintiff posited that his response had not been docketed due to an indeterminable error that had occurred in either the prison mail room/post office or in the federal courthouse. ECF No. 178, ¶4. By order entered that same day, Judge Lanzillo denied Plaintiff's motion but stated that, if Plaintiff wished to bring his response to this Court's attention, he should append the document to his objections. ECF No. 179. Plaintiff did not append his response to his objections but, rather, filed his response and an accompanying memorandum as separate docket entries. *See* ECF Nos. 181, 182. Regardless, Plaintiff's submissions in opposition to Williamson's Rule 12(b) motion have been reviewed and considered by the undersigned, along with Plaintiff's original and "perfected" objections. ECF No. 180, 183.

1. Objections Relating to the DOC Defendants

Defendant Silva

Among the DOC Defendants named in this case is Joseph Silva, the Director of Health Services at SCI-Forest. Judge Lanzillo observed that, while Silva was named as a Defendant, none of Plaintiff's averments pertained to him specifically; therefore, Plaintiff had pled no factual basis to establish his personal involvement in the alleged wrongdoing. In his objections, Plaintiff purports to predicate Silva's liability on his response to an unspecified grievance which, according to Plaintiff, shows Silva's awareness of Plaintiff's serious medical condition and failure to remedy the problem. ECF No. 180 at 10. This argument fails because a prison official's involvement in the grievance process is an insufficient basis for establishing the necessary personal involvement for purposes of liability under §1983. *See Curtis v. Wetzel*, 763 F. App'x 259, 263 (3d Cir. 2019) (recognizing that defendants who participated only in the denial of the plaintiff's grievances lacked the requisite personal involvement in the alleged wrongdoing); *Pumba v. Mill*er, Civil Action No. 22-2050, 2022 WL 11804036, at *6 (E.D. Pa. Oct. 20, 2022) ("[P]articipation in the grievance process does not, without more, establish involvement in the underlying constitutional violation.").

Plaintiff also objects that his efforts to establish a claim against Silva were hampered by the Judge Lanzillo's refusal to allow discovery. But this was not error on the part of the Magistrate Judge. First, Plaintiff concedes that he obtained the bulk of his medical records in February 2021, prior to filing suit. He therefore possessed the means to discern Silva's involvement, if any, in the allegedly inadequate medical care which forms the gravamen of his claims. Second, at this early stage of the litigation, Plaintiff was not entitled to formal discovery since the sufficiency of his claims depends solely on his good faith factual averments, not on

evidentiary proof. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009) ("Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."); '*Torah v. Emrich*, Civ. No. 20-5533, 2022 WL 4540812, at *3 n.3 (D.N.J. Sept. 28, 2022) ("Plaintiff is not entitled to discovery in order to overcome a motion to dismiss."); *Roberts v. Allwein,* No. 3:21-CV-29, 2022 WL 2073341, at *2 (W.D. Pa. June 9, 2022) (court noting that "factual investigation is not necessary to resolve the pending Motion to Dismiss . . . , and Plaintiff is not entitled to discovery at this stage in the litigation when he has failed to sufficiently plead his . . . claim.").

Defendants Overmeyer, Oberlander, Varner, and Moore

Plaintiff raises similar objections in relation to his claims against DOC Defendants Overmeyer, Oberlander, Varner, and Moore. Judge Lanzillo recommended that these Defendants be dismissed from the case because their only involvement was through the grievance process which, as discussed, is an insufficient basis for personal involvement under §1983. *See Curtis,* 763 F. App'x at 263; *Pumba,* 2022 WL 11804036, at *6. Plaintiff objects that he was hampered in his ability to establish a supervisory liability claim against these individuals due to the lack of discovery. Again, this argument fails, as discovery is generally not appropriate at the Rule 12 stage. *See Iqbal*, 556 U.S. at 678–79; '*Torah*, 2022 WL 4540812, at *3 n.3; *Roberts,* 2022 WL 2073341, at *2.

Defendant Essono

In assessing the claim against CRNP Jean Essono, Judge Lanzillo observed that her only contact is alleged to have occurred on November 26, 2021, when Essono saw Plaintiff for complaints of severe lower back pain. At that point, Plaintiff had already been evaluated by Drs. Wecht and Williamson, neither of whom recommended surgery to address Plaintiff's ongoing

symptoms. According to Plaintiff's averments, Essono "was in possession of plaintiff's medical file" and was aware that he suffered from "osteoarthritis, degenerative disc disease, two herniated discs, spinal stenosis, and various diagnos[es] of nerve root compression[.]" ECF No. 147, ¶140. Plaintiff wanted to consult with a different neurosurgeon or orthopedic surgeon due to the fact that Dr. Wecht had documented "'no evidence of new root compression," in apparent contradiction to Plaintiff's MRI report from January 24, 2020, which "clearly states" that there was nerve root compression at L3-L4. *Id.* But instead of honoring Plaintiff's request for a new outside consult, Essono allegedly "intentionally ignored clinical signs of [Plaintiff's] sufferings." *Id.* Judge Lanzillo found that these averments were insufficient to establish a plausible inference of deliberate indifference on the part of Essono. Plaintiff disagrees, and adds in his objections that, instead of providing the requested referral, Essono merely prescribed Pamelor and recommended physical therapy, knowing these were insufficient measures to address his pain.

Having considered the issue on a *de novo* basis, the Court finds Plaintiff's objections unavailing. For the reasons set forth in Judge Lanzillo's Report and Recommendation, the Court finds that Plaintiff's averments demonstrate his disagreement with the Defendant's medical judgment but do not establish a plausible claim of deliberate indifference to a serious medical need. *See Williams v. Clark*, No. 22-1068, 2022 WL 1402052, at *2 (3d Cir. May 4, 2022). Accordingly, Plaintiff's Eighth Amendment claim against Essono cannot proceed based upon the November 26, 2021 incident.

Defendant Smith

The Magistrate Judge recommended that the claim against Defendant Smith be dismissed for lack of any allegations establishing her personal involvement in the alleged wrongdoing. In particular, Judge Lanzillo observed that neither the Amended Complaint nor its supplement

stated any factual allegation against Smith beyond noting her position as "Correctional Health Care Administrator." Plaintiff objects that this was error. He insists that Smith's involvement should be inferred from an Inmate Request form that he sent to her in March of 2021 inquiring about the perceived contradiction between his MRI reports and the reports of Drs. Williamson and Wecht concerning nerve root compression. Pointing to Smith's responsibilities as the prison health care administrator, Plaintiff argues that her deliberate indifference can be inferred from her awareness of the deficiencies in his medical care and her refusal to provide a reasonable response.

Again, these objections lack merit. Smith's receipt of an Inmate Request form does not establish her personal involvement in the alleged Eighth Amendment violation as required under §1983. *See Rieco v. Moran,* 633 F. App'x 76, 80 (3d Cir. 2015) (response to inmate request slip does not suffice to show personal involvement); *Begandy v. Wellpath*, No. 1:21-cv-213, 2022 WL 18282896, at *10 (W.D. Pa. Oct. 27, 2022) (staff member's response to inmate request slip was insufficient to show personal involvement), *report and recommendation adopted,* No. CV 21-213, 2023 WL 185206 (W.D. Pa. Jan. 13, 2023). Moreover, Smith's role as Correctional Health Care Administrator is an administrative position, not a medical one. As such, CHCA Smith "cannot be liable simply for failing to second-guess the medical judgment of Plaintiff's health care providers or for failing to dictate an alternative course of treatment." *McGinnis v. Hammer*, 2017 WL 4286420, at *12 (W.D. Pa. July 28, 2017) (citing *Durmer v. O'Carroll*, 991 F.2d 64, 69 (3d Cir. 1993)). *See also Ascenzi v. Diaz*, 2007 WL 1031516, at *5 (M.D. Pa. Mar. 30, 2007) (holding that prison's health care administrator lacked any medical authority to dictate the course of inmate's treatment and could not be considered

deliberately indifferent for failing to second-guess the treating physician's assessment of the inmate's medical needs). Accordingly, Plaintiff's objections are not well-taken.

Defendant Prinkey

Plaintiff also objects to the recommended dismissal of his Eighth Amendment claim against Defendant Prinkey, a Registered Nurse Supervisor. Judge Lanzillo concluded that Plaintiff's averments against Prinkey could be viewed in two different ways. To the extent Plaintiff was basing his claim on Prinkey's involvement in responding to an administrative grievance, Judge Lanzillo determined that the claim failed, "because 'the filing of a grievance is not sufficient to show the actual knowledge necessary for a defendant to be found personally involved in the alleged unlawful conduct.'" ECF No. 172 at 18 (citing authority). But to the extent Plaintiff was predicating his claim on Prinkey's substantive determination that no further testing or consultation was medically necessary to address Plaintiff's symptoms, Judge Lanzillo determined that such a claim boiled down to a mere difference of opinion about the proper course of Plaintiff's medical treatment, which is not enough to establish deliberate indifference. *Id.* at 19 (citing authority). In either case, Judge Lanzillo concluded that the Amended Complaint did not state a viable Eighth Amendment claim against Prinkey.

Plaintiff's objections make clear that his claim against Prinkey is based partly on Prinkey's response to Grievance Number 629905. ECF No. 180 at 14; ECF No. 180-1 at 7. As discussed, this document does not provide the necessary "personal involvement" that §1983 demands, notwithstanding Prinkey's supervisory title. Plaintiff's objections also suggest that he believes Prinkey was deliberately indifferent in merely endorsing a more conservative course of treatment that included physical therapy, epidural injections, and diabetic shoes to address his various symptoms. For the reasons explained by Judge Lanzillo, the Court agrees that Prinkey's

alleged actions in this regard do not arise to the level of deliberate indifference to a serious medical need. *See Williams,* 2022 WL 1402052, at *2 (allegations that establish a "mere disagreement as to the proper medical treatment" are insufficient to support an Eighth Amendment claim). Perhaps trying to circumvent this point, Plaintiff insists that "[t]his civil case is about the Medical Defendants concealing the fact that [Plaintiff] suffered from 'nerve root compression' which causes the symptoms complained of by [him]." ECF No. 180 at 15. But insofar as Prinkey is concerned, Plaintiff's concealment theory is belied by Prinkey's June 23, 2016 response to Grievance Number 629905, wherein Prinkey expressly recounted that a 2010 MRI study had found "a moderate to severe right foraminal encroachment on the spinal nerves . . . resulting in numbness & tingling and some weakness in [Plaintiff's] lower extremities." ECF No. 180-1 at 7. As this grievance response was published to Plaintiff, it cannot plausibly be alleged that Prinkey concealed the diagnosis of nerve root compression or its relation to Plaintiff's symptoms. Accordingly, having fully reviewed Plaintiff's objections to the R&R, the Court perceives no basis for departing from the Magistrate Judge's recommendation.

2. Objections Relating to the Corporate Defendants

Plaintiff's objections relative to the claims against the Corporate Defendants are similarly unavailing. As to WellPath and Correct Care Solutions, Judge Lanzillo found that Plaintiff had not pled facts to establish plausible liability under the principles set forth in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). *See Dixon v. Pennsylvania Dep't of Corr.*, 2022 WL 3330142, at *7 (M.D. Pa. Aug. 11, 2022) (recognizing that *Monell*'s jurisprudence pertaining to municipal liability has been extended to civil rights claims against corporate institutions). Plaintiff objects that he was unable to assert such claims in the absence of discovery. But as discussed, Plaintiff was not entitled to obtain discovery for the purpose of

defending against a Rule 12(b)(6) motion. *See Iqbal*, 556 U.S. at 678–79; '*Torah*, 2022 WL 4540812, at *3 n.3; *Roberts,* 2022 WL 2073341, at *2.

3. Objections Relating to the Individual Medical Defendants

With respect to Defendants Eisenberg, Leslie, Maxa, and Sutherland, the Magistrate Judge determined that nearly every aspect of Plaintiff's Eighth Amendment claim against these Defendants was untimely, because the claim was largely predicted on events that had transpired well outside of the two-year statute of limitations.[2] The Magistrate Judge's analysis in this regard accounted for periods when the statute of limitations would have been tolled as a result of Plaintiff's efforts to exhaust his administrative remedies through the prison grievance system. *See Wisniewski v. Fisher,* 857 F.3d 152, 158 (3d Cir. 2017). The one treatment incident that *did* occur within the statute of limitations period involved Plaintiff's interaction with Defendant Leslie on March 20, 2021. As to this incident, Judge Lanzillo found that the alleged facts could not support a plausible inference of deliberate indifference because they established only that Plaintiff disagreed with Leslie's medical judgment concerning the proper course of his treatment. Plaintiff now objects to all aspects of the Magistrate Judge's analysis.

Most of Plaintiff's objections entail a "rehashing" of arguments previously considered and rejected by the Magistrate Judge. Plaintiff argues, for example, that the Medical Defendants fraudulently concealed objective medical findings of nerve root compression and the causal connection between this condition and Plaintiff's ongoing symptoms, as documented in certain studies conducted at Kane Hospital in 2018 and 2020. Plaintiff appears to be arguing that the

[2] The length of the statute of limitations for a § 1983 claim is governed by the personal injury tort law of the state where the cause of action arose. *Wallace v. Kato*, 549 U.S. 384, 387 (2007). The statute of limitations for a § 1983 claim arising in Pennsylvania is two years. 42 Pa. Cons. Stat. § 5524(2); *see also Kost v. Kozakiewicz*, 1 F.3d 176, 189–90 (3d Cir.1993).

statute of limitations did not begin to run until February 25, 2021 when he received the "bulk" of his medical file which, he claims, revealed the Medical Defendants' awareness of the cause of his symptoms and the fact that Dr. Williamson's and Dr. Wecht's medical findings contradicted the MRI reports. Separately, Plaintiff objects that the "continuing violation" doctrine renders his Eighth Amendment claim timely. Upon *de novo* review, the Court concurs with the Magistrate Judge's analysis and finds Plaintiff's arguments unavailing, essentially for the reasons expressed in the Report and Recommendation. But Plaintiff has raised some additional points that warrant further comment.

With respect to Dr. Eisenberg, Plaintiff objects that the Magistrate Judge mistakenly determined that no grievance had been filed relative to this Defendant's involvement in Plaintiff's treatment. To rebut this point, Plaintiff has appended Grievance Number 629905, wherein he expressed dissatisfaction with the medical treatment that Eisenberg rendered on June 10, 2016. *See* ECF No. 183-1 at 3-6. This grievance is relevant to the statute of limitations calculation, because the limitations period would have been tolled during the time that Plaintiff exhausted his administrative remedies. *See Wisniewski,* 857 F.3d at 158. Even so, Plaintiff's argument on this point does not change the outcome. Critically, the records show that Grievance Number 629905 was filed on June 10, 2016 (the day of Dr. Eisenberg's last treatment session); the grievance was finally denied (and thereby exhausted) on November 17, 2016. *See* ECF No. 156-3 at 22. Plaintiff filed his complaint more than five years later, making his Eighth Amendment claim against Eisenberg patently untimely.

Plaintiff nevertheless suggests that the applicable statute of limitations should have been tolled (as to all Defendants) between April 2020 and November 2021, when access to the prison law library was substantially curtailed in connection with the Covid-19 pandemic. By this

argument, Plaintiff appears to invoke principles of equitable tolling, which may apply "if a litigant can demonstrate (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *A.S. ex rel. Miller v. SmithKline Beecham Corp.*, 769 F.3d 204, 212 (3d Cir. 2014) (quotation marks omitted).

In this case, the Court is not persuaded that equitable tolling applies. To begin, it appears that Plaintiff's claims against Defendants Eisenberg, Sutherland, and Dr. Maxa became untimely even prior to April 2020, when the library restrictions were allegedly imposed. Furthermore, the gravamen of Plaintiff's Eighth Amendment claim is that the Medical Defendants displayed deliberate indifference to his serious medical needs by not referring him for surgery to address the nerve root compression in his lower spine. The accrual of this claim depended on Plaintiff's ability to discover facts, as opposed to principles of law. *See, e.g., Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 464 (6th Cir. 2012) ("[P]ro se status and lack of knowledge of the law are not sufficient to constitute an extraordinary circumstance and to excuse [ ] late filing."); *Pace v. Irwin*, No. CV 22-3050, 2022 WL 17812821, at *3 n. 40 (noting that courts have not recognized lack of knowledge of the law as a valid reason for equitable tolling purposes) (E.D. Pa. Dec. 19, 2022); *Polanco v. Commonwealth*, No. 4:22-CV-00373, 2022 WL 16540079, at *2–3 (M.D. Pa. Oct. 28, 2022) (rejecting petitioner's equitable tolling argument in a case filed under 28 U.S.C. §2254 and noting that petitioner had "not explained how limited access to the prison law library prevented him from filling out a form Section 2254 petition[ ]—which does not require citation to legal authority or legal argument—and mailing it to the appropriate federal court to preserve his statute of limitations.") (footnote omitted). But to the extent Plaintiff's prosecution of his claims *did* depend on his access to legal materials, his filings indicate that he

was not entirely restricted from the library and also had the ability to request that specific legal materials be sent to his cell. *See* ECF No. 180-1 at 22.

Moreover, Plaintiff has not demonstrated that he diligently pursued his rights in this case. His own averments and records show that he has been advocating for surgery since at least 2015 to address the alleged nerve root compression in his lower back. *See* Amended complaint, ECF No. 68, ¶¶73-77, 81.[3] With respect to Plaintiff's claims against CPRN Andrew Leslie, the Magistrate Judge considered Plaintiff's grievance records and concluded that the two-year filing period for any claims relating to Grievance Nos. 790330 and 921481 would have expired on May 3, 2020 and January 28, 2022, respectively. Plaintiff has not made any showing why he could not have filed his legal claims related to Grievance No. 790330 prior to April 2020, when the library restrictions allegedly began; similarly, no explanation is given as to why Plaintiff could not have filed his legal claims related to Grievance No. 921481 between December 2021 and January 28, 2022, when the restrictions were no longer in place. His lack of diligence precludes application of equitable tolling in this case.

Plaintiff next objects to the Magistrate Judge's alternative conclusion that he has not pled facts establishing deliberate indifference on the part of the Medical Defendants. As Judge Lanzillo explained, Plaintiff's averments demonstrate that he received substantial medical care at SCI-Forest for his back condition over a period of many years. This allegedly included numerous medical appointments and examinations, the prescription of medications and epidurals, physical therapy, special shoes, and referral to outside specialists. While Plaintiff insists that the Defendants persisted in an ineffectual course of treatment, his averments do not

[3] *See also* the Initial Review Response to Grievance Number 599548, ECF No. 183-1 at 1-2, reflecting Plaintiff's request for surgery in November 2015 and disclosing that a 2010 lumber spine MRI showed "pressure on the nerves" at the L3-L4 region as a result of disc-related issues.

plausibly establish an unconstitutional deprivation of care. *See Gause v. Diguglielmo*, 339 F. App'x 132, 135 (3d Cir. 2009) (Deliberate indifference standard unmet where "[Plaintiff's] medical records show that he was seen many times by the prison medical staff and received medicine, physical therapy, and even treatment outside of the prison," thus establishing that "[Plaintiff] received medical care."). Instead, the Medical Defendants' refusal to pursue surgery for Plaintiff amounts to a difference in medical judgment or, at most, negligent conduct. But "the mere misdiagnosis of a condition or medical need, or negligent treatment provided for a condition, is not actionable as an Eighth Amendment claim because medical malpractice standing alone is not a constitutional violation." *Begandy,* 2022 WL 18282896, at *6 (citing authority). To that end, "the Third Circuit has made clear that 'there is a critical distinction 'between cases where the complaint alleges a complete denial of medical care and those alleging inadequate medical treatment.'" *Id.* (quoting *Wisniewski v. Frommer*, 751 F. App'x 192, 195-96 (3d Cir. Oct. 3, 2018)). Here, Plaintiff's allegations fall into the latter category. Moreover, his assertion that the Medical Defendants have rejected surgery for financial reasons is not sufficient to establish deliberate indifference. *See Winslow v. Prison Health Services*, 406 F. App'x 671, 674 (3d Cir. 2011) ("[T]he naked assertion that Defendants considered cost in treating [plaintiff's] hernia does not suffice to state a claim for deliberate indifference, as prisoners do not have a constitutional right to limitless medical care, free of the cost constraints under which law-abiding citizens receive treatment."); *Sanders v. Centurion, LLC*, No. CV 22-826-RGA, 2022 WL 17092346, at *4 (D. Del. Nov. 21, 2022) (plaintiff received constitutionally adequate care where he consistently received examinations, medication, diagnostic testing, and was taken to the hospital when necessary, even if cost considerations factored into the decision to change his medication). Plaintiff's objections are therefore not well-taken.

4. Objections Relating to Drs. Williamson and Wecht

Finally, Plaintiff objects to the Magistrate Judge's recommendation that the Eighth Amendment claims against Drs. Williamson and Wecht be dismissed. Judge Lanzillo reasoned that the pleadings did not plausibly establish either physician's status as individuals who had acted under color of state law; thus, they could not be held liable under §1983. *See Kach v. Hose,* 589 F.3d 626, 646 (3d Cir. 2009) ("[A] plaintiff seeking to hold an individual liable under § 1983 must establish that she was deprived of a federal constitutional or statutory right by a state actor.").

On *de novo* review of the R&R, the Court finds no reason to depart from the Magistrate Judge's recommendation. As set forth in the Report and Recommendation, Plaintiff has not pled facts to plausibly establish Dr. Williamson and/or Dr. Wecht as state actors. But even if he had, the allegations in the Amended Complaint do not plausibly show that the Defendants were deliberately indifferent to a serious medical need.

Here, Plaintiff claims that he was seen by Dr. Williamson on three occasions in February 2017, February 2018, and March 2019. On the first occasion, Dr. Williamson concluded that Plaintiff's symptoms were not explained by prior MRI findings, and he referred Plaintiff for physical training, pain management, and an EMG/NVC. ECF No. 68 at ¶¶95- 96. Plaintiff underwent the EMG/NVC study on March 17, 2017, *id.* at ¶¶ 99 and 102, and subsequently received an epidural injection at the L3-L4 area, as recommended by Dr. Williamson. *Id.* at ¶103. On June 8, 2017, Plaintiff received another epidural injection in the S1 area based on the EMG study that had localized nerve root compression to the sacral area. *Id.* at ¶105. From August through October 2017, Plaintiff underwent physical therapy as recommended by Dr. Williamson, but he stopped due to "the extreme pain he felt when doing so." *Id.* at ¶¶107-108. According to

Plaintiff, the physical therapist told him that physical therapy would be "ineffective" and that surgery was needed. *Id.* at ¶108. On February 1, 2018 Plaintiff was again seen by Dr. Williamson, who did not conduct a physical exam on that date. Dr. Williamson allegedly reviewed some of Plaintiff's MRI images but was not in possession of his lumbosacral images. *Id.* at ¶¶109-110. Dr. Williamson concluded that surgery was not warranted at that time. *Id.* at ¶109. On December 11, 2018, Plaintiff had a video visit with neurologist Dr. Kevin Kelly, who recommended that Plaintiff be referred back to neurosurgery for re-evaluation of the imaging studies and to determine if his complaints were amenable to surgical intervention. *Id.* at ¶¶114, 116. Accordingly, Dr. Williamson saw Plaintiff for the third time on March 1, 2019. *Id.* at ¶117. After reviewing Plaintiff's studies and conducting a neurological examination, Dr. Williamson reported that he did "not see any compression pathology to explain [Plaintiff's] right lower extremity symptoms," but he nevertheless recommended that Plaintiff be seen by neurology for further evaluation and management. *Id.* at ¶¶117, 119, 120, 125, 129. Defendant Maxa allegedly determined that the recommended evaluation was not necessary. *Id.* at ¶129.

Plaintiff complains that Dr. Williamson's report of March 1, 2019 contained significant omissions and failed to include (1) consideration of Plaintiff's osteoarthritis; (2) the correct location of Plaintiff's herniation; (3) discussion of findings related to the existence of the Hoffman's sign and correlating nerve root compression; and (4) reference to Plaintiff's second herniation at S1. ECF 68 at ¶126. Plaintiff alleges that these omissions either (1) were "designed to benefit the defendant WELLPATH and the defendants employed at SCI Forest by avoiding a doctor's recommendation for surgery" or (2) were evidence that Dr. Williamson "failed to exercise ordinary knowledge, skill, and care" in treating him. Id. at ¶¶ 127-128.

On February 10, 2020, Plaintiff consulted with Dr. Wecht, a different neurosurgeon affiliated with UPMC-Presbyterian. ECF No. 68, ¶¶131-132. Dr. Wecht found no evidence of lumbar nerve root compression, but he recommended that Plaintiff be seen by an arthritis expert to treat his arthritis pain and further recommended that Plaintiff receive an orthopedic shoe to manage the pain in his feet. *Id.* at ¶¶ 133-134, 138-139. Plaintiff alleges, in a conclusory statement, that Dr. Wecht's finding of no evidence of lumbar nerve root compression "can only be an intentional misstatement serving as an official rubber-stamp for" SCI-Forest to not provide surgery". *Id.* at ¶ 135. As with Dr. Williamson, Plaintiff claims that the other Defendants refused to follow Dr. Wecht's treatment recommendations. *Id.* at ¶ 40.

When accepted as truthful, Plaintiff's averments do not establish a plausible inference of deliberate indifference. Once Plaintiff's conclusory allegations of conspiracy are appropriately disregarded, his averments show only that Plaintiff disagrees with the medical judgments and treatments rendered by Drs. Williamson and Wecht or, at most, that those doctors rendered substandard care. But even if Plaintiff's allegations support a plausible inference of negligence, this is insufficient to establish a viable Eighth Amendment violation. *Begandy*, 2022 WL 18282896, at *7.

In support of his objections, Plaintiff has submitted his own affidavit, dated November 1, 2022, in which he recounts statements allegedly made by Dr. Benjamin Robinson, a WellPath physician serving inmates at SCI-Coal Township, where Plaintiff is now housed. *See* ECF No. 180-1 at 2-3. According to this affidavit, Dr. Robinson opined during a July 2022 medical visit that Plaintiff had received insufficient medical care at SCI-Forest. *Id.* Dr. Robinson then attempted (unsuccessfully) to refer Plaintiff to an orthopedic surgeon. *Id.* Plaintiff's affidavit, which consists entirely of inadmissible hearsay statements, cannot be considered in conjunction

with the Court's Rule 12(b)(6) analysis. *See Sledge v. Martin,* No. 1:21-CV-348, 2023 WL 2332464, at *3 (W.D. Pa. Mar. 2, 2023) (discussing the proper scope of review under Rule 12(b)(6)).[4] On the other hand, the undersigned has considered the affidavit insofar as it informs the Court's consideration of whether further amendment is warranted. Specifically, the Court acknowledges Plaintiff's averments concerning the substance of Dr. Robinson's medical opinion. But even if Plaintiff were to incorporate these averments into an amended pleading, they would not save his Eighth Amendment claims because, at most, Dr. Robinson's opinion evidences a conflicting medical judgment which could conceivably support a claim for negligence but not deliberate indifference.

5. Motion for Leave to Supplement Plaintiff's Complaint (ECF No. 185)

On February 27, 2023, the Court received Plaintiff's Motion for Leave to Supplement [His] Complaint. ECF No. 185. In this motion, Plaintiff again offers averments about his consultation with Dr. Benjamin Robinson on July 26, 2022 and Dr. Robinson's opinion that Plaintiff has received inadequate care, that the opinions and findings of Drs. Wecht and Williamson contradicted Plaintiff's MRI reports, and that Plaintiff should be seen by an orthopedic surgeon. *Id.*, ¶¶3-4. Plaintiff claims that Wellpath's Medical Director for the Eastern District of Pennsylvania has denied Dr. Robinson's request for an orthopedic surgeon referral. Plaintiff further alleges that Nurse Ackerman falsified Plaintiff's medical records by falsely documenting his ability to ambulate without difficulty. *Id.*, ¶¶6-8. Plaintiff wishes to

[4] Nor could Plaintiff's affidavit be considered for purposes of a Rule 56 analysis, even if the Court were inclined to convert the pending motions into motions for summary judgment (which the Court is not inclined to do). *See* Fed. R. Civ. P. 12(d). Under Rule 56, a Court can consider hearsay information only if it is properly reducible to admissible evidence at trial. *See Shelton v. University of Medicine & Dentistry of New Jersey,* 223 F.3d 220, 222–23 n. 2 (3d Cir. 2000); *Williams v. Borough of West Chester,* 891 F.2d 458, 466 n. 12 (3d Cir. 1989). To meet this standard, Plaintiff would need to submit an affidavit from Dr. Robinson himself, attesting to his own observations and conclusions.

supplement his pleading in order to add as new Defendants Nurse Ackerman, along with Wellpath's Medical Director for the State of Pennsylvania and its Medical Director for the Eastern District of Pennsylvania. *Id.*, ¶9. Plaintiff intends to allege, among other things, that Wellpath's medical staff persist in a course of treatment known to be ineffective relative to Plaintiff's nerve root compression. *Id.*, at ¶¶10-11. Plaintiff's intended averments concern events that transpired during a different period of time at a different state institution within in a different judicial district. His motion to amend the current pleadings will be denied, but without prejudice to Plaintiff's right to assert any new claims he intends to pursue against the aforementioned individuals in a new lawsuit, in the appropriate forum.

In sum, after *de novo* review of the operative pleading and documents in the case, including the Defendants' pending motions, Plaintiff's responses, the Magistrate Judge's Report and Recommendation, Plaintiff's objections, and the Defendants' responses thereto, the following order is entered:

NOW, this 13th day of March, 2023, IT IS ORDERED that the motion to dismiss filed by Daniel Wecht, ECF No. [84], the motion to dismiss filed by Richard Williamson, ECF No. [105], the motion to dismiss filed by the Medical Defendants, ECF No. [109], and the motion to dismiss filed by the DOC Defendants, ECF No. [121], shall be, and hereby are, GRANTED in part and DISMISSED in part, as follows:

1. Insofar as Defendants' motions to dismiss are directed at Plaintiff's Eighth Amendment claim under 42 U.S.C. §1983, the motions are GRANTED; accordingly, Plaintiff's Eighth Amendment claim under 42 U.S.C. §1983 is hereby DISMISSED with prejudice.

2. Having thus dismissed the federal claim over which it exercised original jurisdiction, the Court in its discretion will decline to exercise supplemental jurisdiction over Plaintiff's remaining state law claim. *See* 28 U.S.C. §1367(c)(3). Consequently, IT IS ORDERED that Plaintiff's medical malpractice claim arising under Pennsylvania law shall be, and hereby is, DISMISSED without prejudice to Plaintiff's right to reassert said claim in the relevant Pennsylvania state court.[5]
3. Insofar as Defendants' motions to dismiss are directed at Plaintiff's claim arising under state law, said motions are DISMISSED without prejudice to Defendants' right to reassert their motions in the appropriate state court, as future circumstances may warrant.

IT IS FURTHER ORDERED that the Defendant Wecht's Motion for Partial Summary Judgment as to the state law claim at Count II of the amended complaint, ECF No. [143], and the Medical Defendants' Motion to Strike Plaintiff's Certificate of Merit, ECF No. [170], shall be, and hereby are, DISMISSED without prejudice to Defendants' right to reassert these motions in the appropriate state court, to the extent future circumstances may so warrant.

IT IS FURTHER ORDERED that the Report and Recommendation of Magistrate Judge Lanzillo issued on January 3, 2023, ECF No. [172], is adopted as the opinion of this Court. Plaintiff's objections to the Report and Recommendation, ECF Nos. [180] and [183], are OVERRULED.

Finally, IT IS ORDERED that Plaintiff's motion for leave to further supplement his pleading, ECF No. [185], is DENIED without prejudice to Plaintiff's right to assert his

[5] The Court notes that, pursuant to 28 U.S.C. §1367(d), the statute of limitations period for any state law claims "shall be tolled while the claim[s] [are] pending and for a period of 30 days after [they are] dismissed unless State law provides for a longer tolling period." Accordingly, Plaintiff should have ample time, following the Clerk's entry of this order, within which to timely reassert his state law claims in Pennsylvania court.

supplemental allegations in a new and separate lawsuit, which should be filed in the appropriate judicial district.

There being no further issues or claims pending before the Court in the above-captioned, case, the Clerk is directed to mark this civil action "CLOSED."

Susan Paradise Baxter

SUSAN PARADISE BAXTER
United States District Judge

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

William Plummer — PETITIONER
(Your Name)

VS.

WELL PATH, et. al. — RESPONDENT(S)

PROOF OF SERVICE

I, William Plummer, do swear or declare that on this date, _____, 2023, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Scott Bardley	Howard Chapson	Shannon Vail Palizzari	Sam Foreman
1251 Watertront Place	Two PPG Place	701 Grant, ste 3800	4 PPG Place
Pittsburgh, Pa. 15222	Pittsburgh, Pa. 15222	PBG, Pa. 15219	Pitts, Pa. 15222

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 24, 2023

(Signature)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ERIE DIVISION

WILLIAM PLUMMER, Plaintiff, vs. WELLPATH, CORRECT CARE SOLUTIONS, DR. ROBERT MAXA, CHCA KIM SMITH, RNS GARY PRINKEY, DR BARRY EISENBERG, CRNP ANDREW LESLIE, RN ESSONNO, DR. DANIEL WECHT, DR. RICHARD WILLIAMSON, SUPERINTENDENT OVERMEYER, DORINA VARNER, ASSISANT KERI MOORE, JOSEPH SILVA, DIRECTOR OF HEALTH SERVICE; CRNP WILLIAM SUTHERLAND, SUPERINTENDANT DEREK OBERLANDER, Defendants,	1:22-CV-00039-SPB Part 2 of 2 RICHARD A. LANZILLO CHIEF UNITED STATES MAGISTRATE JUDGE OMNIBUS REPORT AND RECOMMENDATION ON DEFENDANTS' PENDING MOTIONS TO DISMISS/SUMMARY JUDGMENT ECF NOS. 84, 105, 109, 121, 143

I. Introduction and Recommendation

Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b), the pending motions to dismiss and for summary judgment were referred to the undersigned for a Report and Recommendation by the Honorable Susan Paradise Baxter. Upon review, it is respectfully recommended that the Defendants' motions to dismiss be **GRANTED.** It is further recommended that the federal claim be dismissed, with prejudice, and that the Court decline to exercise supplemental jurisdiction over the state-law claim, dismissing that claim without

APPENDIX (B) of MAGISTRATE JUDGE

prejudice to it being refiled in the appropriate state court. Defendant Wecht's motion for summary judgment on the state-law claim should then be dismissed as moot.

II. Factual Allegations and Relevant Procedural History

Plaintiff William Plummer ("Plummer") commenced this action on February 10, 2022, asserting federal civil rights claims under 42 U.S.C. § 1983, and state law against fourteen individual defendants and two corporate defendants. *See* ECF Nos. 1, 7. The individual defendants include employees of the Pennsylvania Department of Corrections ("DOC"), employees of the DOC's medical services contractor, and two independent Pennsylvania physicians. Plummer broadly alleges that all Defendants acted with deliberate indifference to his medical needs, thereby subjecting him to cruel and unusual punishment, in violation of the Eighth Amendment to the Constitution.

In response to several motions to dismiss, Plummer filed an Amended Complaint, his operative pleading, on March 16, 2022. *See* ECF No. 68 (Amended Complaint). Plummer later moved to file a Second Amended Complaint. *See* ECF No. 119. That motion was denied , but Plummer's proposed amended pleading was docketed as a supplement to the operative complaint. *See* ECF No. 120 (Order); ECF No. 145 (Supplement). The Amended Complaint, and its supplement, are lengthy and set out the extensive medical care Plummer has received. These factual averments must be accepted as true for purpose of deciding the pending motions. *See, e.g., Gaglialdi v. Fisher*, 513 F.Supp.2d 457, 463 (W.D. Pa. 2007).

Plummer is currently incarcerated at SCI-Coal Township, but the events giving rise to this action occurred while he was housed at SCI-Forest. He suffers from "osteoarthritis, degenerative disc disease, two herniated disc[s], and spinal stenosis." ECF No. 68, ¶ 2.

Plummer alleges a "long history" of back pain, which he traces to a 2006 injury he sustained while exercising. *Id.*, ¶ 23. Plummer contends that while incarcerated at SCI-Green, "he felt something slip in his lower back." *Id.* On February 8, 2010, Plummer had an MRI, which revealed a "small diffuse disc bulge with a rightward predominance, mild facet arthrosis and moderate to severe right forminal encroachment at L3-L4. At L4-L5, [he] had mild bilateral facet osteophyte complex contributing to minimal central stenosis with mild bilateral forminal narrowing." *Id.* at ¶ 25.

Plummer was released from SCI-Green in July of 2010. *Id.* at ¶ 57. While at liberty, he sought treatment for his back at the Albert Einstein Medical Center. *Id.* He received treatment for his back pain from physicians at that institution. *Id.* at ¶ 59. On October 15, 2013, Plummer was again arrested. *Id.* at ¶ 60. He began to seek treatment for his condition upon his re-incarceration at SCI-Forest in 2015. *Id.* at ¶ 61. Indeed, Plummer acknowledges that he has "been seeking treatment for his chronic condition for (7) years, resulting in countless visits to the medical department at SCI Forest." *Id.* at ¶ 69. The Amended Complaint relates years of medical history, which has been organized graphically in this chart:

Date	Averment	ECF Citation
12-3-2015	RNS Prinkey advised Plummer to purchase Ibuprofen, "Actaminophenl" ("Tylenol"), and "muscle rub" from the prison commissary for his back pain	ECF No. 68, ¶ 71
2-11-2016	Plummer was seen by Dr. Eisenberg and asked Eisenberg to order an MRI and to be taken to an outside hospital for surgery. Eisenberg allegedly responded that surgery was "too expensive."	ECF No. 68, ¶ 74
3-2-2016	Plummer was again seen by Dr. Eisenberg. Eisenberg again refused to order an MRI or CT scan for Plummer and declined to refer him to an outside neurologist or neurosurgeon.	ECF No. 68, ¶ 76
6-10-2016	Plummer saw Dr. Eisenberg again and explained that "Motrin" and "Kenalog injections" were not relieving his pain. Plummer also expressed concern that he may become "bound to a wheelchair unless is he is provided surgery." Eisenberg	ECF No. 68, ¶ 77

Date	Averment	ECF Citation
	stated, "there is nothing we can do" and told Plummer to purchase over-the-counter medication from the commissary.	
6-23-2016	After again complaining of pain, Prinkey responded to Plummer, noting the results of Plummer's 2010 MRI.	ECF No. 68, ¶ 81
7-20-2016	Plummer again complained of pain to prison medical personnel (McKeel and Maxa) and was told there was nothing they could do. Dr. Maxa told Plummer that there was no "acute signs of injury" based on Plummer's inability to designate the "exact location of his pain."	ECF No. 68, ¶ 82; ¶ 86
1-27-2017	After reviewing Plummer's x-ray, Dr. Zimmerman found that Plummer had "soft tissue swelling and joint effusion.	ECF No. 68, ¶ 90
2-10-2017	An MRI on Plummer's spine was conducted at Kane Community Hospital; this showed a "desiccation of the disc with moderate narrowing of the disc space, modic type degenerative changes to the vertebral endplate, small to moderate size posterior central, left paracentral, right paracentral, and posterolateral disc herniation with extrinsic compression over the adjoining dural sac and nerve root and right foraminal atenosis.	ECF No. 68, ¶ 91; ¶ 92
2-16-2017	Plummer was evaluated by Dr. Williamson at Williamson's office; Williamson concluded that Plummer's symptoms were not explained by his MRI and recommended physical "training" and pain management as well as an "EMG/NCV"	ECF No. 68, ¶ 95; ¶ 96
2-20-2017	Plummer collapses and was taken to the medical department	ECF No. 68, ¶ 98
3-17-2017	A "nerve conduction study" was conducted.	ECF No. 68. ¶ 102
4-13-2017	Plummer taken to the Interventional Pain Management Center and was seen by Dr. List. Plummer received an epidural injection as recommended by Dr. Williamson.	ECF No. 68, ¶ 103.
6-8-2017	Plummer received another epidural injection from Dr. List	ECF No. 68, ¶ 105
7-21-2017	Plummer fell and was taken to medical department. Maxa, Smith, and Prinkey refused Plummer's request for a wheelchair	ECF No. 68, ¶ 106
8-2017	Plummer begins physical therapy	ECF No. 68, ¶ 107
10-19-2017	Plummer advised by Dr. Zappa that the physical therapy would be "ineffective" and that Plummer needed surgery.	ECF No. 68, ¶ 108
2-1-2018	Plummer seen again by Dr. Williamson, who stated that surgery was not necessary and that Plummer's symptoms were not due to a lower motor neuron issue but rather an upper neuron issue; Williamson conducted a physical examination, personally reviewed the MRI	ECF No. 68, ¶ 109

Date	Averment	ECF Citation
3-29-2018	Plummer seen by Nurse Leslie who requested gabapentin for Plummer	ECF No. 68, ¶ 111
7-31-2018	Dr. Small, via a telemed appointment, told Plummer there were no upper motor neuron issues.	ECF No. 68, ¶ 112
10-24-2018	Plummer seen by Nurse Sutherland; Sutherland prescribed prednisone for Plummer which did not help his symptoms	ECF No. 68, ¶ 113
12-11-2018	Plummer seen by Dr. Kelly a neurologist; Kelly advised that Plummer would be seen by a different neurosurgeon (other than Dr. Williamson)	ECF No. 68, ¶ 115-116
3-1-2019	Plummer again seen by Dr. Williams; Williams conducted tests and opined that he "did not see any compression pathology to explain [Plummer's] right lower extremity symptoms."	ECF No. 68, ¶ 117; ¶ 125
1-14-2020	Plummer has a consultation with Dr. Wecht	ECF No. 68, ¶ 131
2-10-2020	Plummer was seen by Dr. Wecht; Wecht noted "no evidence of nerve root compression;" Wecht recommended that Plummer be seen by an "arthritis expert" and treated for "arthritis pain."	ECF No. 68, ¶ 133. ¶ 138
3-20-2021	Plummer seen by CRNP Andrew Leslie; Plummer was told that "we decided that there was not any need to follow through with the recommendations made on 2/10/2020	ECF No. 147, ¶ 139
11-26-2021	Plummer seen by CRNP Jean Essono who did not act on Plummer's request for a consultation with a different neurosurgeon	EFC No. 147, ¶ 140

Based on this medical history, Plummer now brings claims alleging violations of the Eighth Amendment (Count I) and for "malpractice-negligence" under state law (Count II). *See* ECF No. 68, ¶¶ 148-156. He identified the following individuals and entities as defendants: Correct Care Solutions, WellPath, Barry Eisenberg, Andrew Leslie, Robert Maxa, and William Sutherland (collectively, "Medical Defendants"; Jeanne Essono, Keri Moore, Derek Oberlander, Overmeyer, Gary Prinkey, Joseph Silva, Kim Smith, and Dorina Varner (collectively, "DOC Defendants"); Daniel Wecht ("Wecht") and Richard Williamson ("Williamson"). *See* ECF No. 68, ¶¶ 7-22. All Defendants have filed motions to dismiss. ECF No. 84 (Wecht); ECF No. 105 (Williamson); ECF No. 109 (Medical Defendants); ECF No. 121 (Medical Defendants).

Defendant Wecht has also filed a motion for summary judgment premised on Plummer's failure to file a certificate of merit, as required by Pennsylvania law. ECF No. 143.

Plummer opposes the motions. He has filed numerous documents in opposition. These include ECF Nos. 100, 101, 102, and 103 in opposition to Defendant Wecht's motion to dismiss; ECF Nos. 153, 154, 156, and 157 in opposition to the DOC Defendants' motion to dismiss; and ECF No. 163 in opposition to the Medical Defendants' motion to dismiss.[1] Additionally, Plummer filed ECF No. 164, which he entitled a "Rebuttal Motion to Defendants Motion for Partial Summary Judgment." In actuality, this is a response in opposition to Defendant Wecht's motion for summary judgment on the state-law claims. Plummer did not respond to Defendant Williamson's motion to dismiss.

On November 4, 2022, the undersigned granted Plummer's motion for an extension of time to secure a certificate of merit in support of his state law claims of medical malpractice and negligence. *See* ECF No. 151. On November 30, 2022, Plummer filed several documents purporting to be certificates of merit. *See* ECF No. 165-1-8. His request for additional time to secure further certificates of merit was denied. *See* ECF No. 166 (motion); ECF No. 167 (Order).

[1] At ECF No. 163, Plummer filed a "Response to Defendants' Answer and Affirmative Defenses ... to the First Amended Complaint," which addresses several of the arguments raised by the Medical Defendants in their motion to dismiss. A "Response" to an answer and/or affirmative defenses is untethered from the docket because the Medical Defendants have not filed an Answer, opting instead to move for dismissal. However, because this documents addresses several arguments propounded by the Medical Defendants in their motion to dismiss, the undersigned has construed and considered it as a response in opposition to the Medical Defendants' motion. The Court notes Plummer's additional filing of a "Response to Wellpath Defendants' Reply in Support of Motion to Dismiss." *See* ECF No. 169.

III. Standards of Decision

A. Motions to Dismiss

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12 (b)(6) tests the legal sufficiency of the complaint. *See Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993). In deciding a Rule 12 (b)(6) motion to dismiss, the court must accept as true all well-pled factual allegations in the complaint and views them in a light most favorable to the plaintiff. *See U.S. Express Lines Ltd. v. Higgins*, 281 F.3d 383, 388 (3d Cir. 2002). The "court[ ] generally consider[s] only the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim" when considering the motion to dismiss. *Lum v. Bank of Am.*, 361 F.3d 217, 222 n.3 (3d Cir. 2004) (citing *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997)).

In making its determination under Rule 12 (b)(6), the court is not opining on whether the plaintiff is likely to prevail on the merits; rather, the plaintiff must only present factual allegations sufficient "to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 556 (2007) (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-36 (3d ed. 2004)). *See also Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Furthermore, a complaint should only be dismissed pursuant to Rule 12 (b)(6) if it fails to allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570 (rejecting the traditional Rule 12 (b)(6) standard established in *Conley v. Gibson*, 355 U.S. 41, 78 (1957)).

Although a complaint does not need detailed factual allegations to survive a motion to dismiss, a complaint must provide more than labels and conclusions. *See Twombly*, 550 U.S. at

555. A "formulaic recitation of the elements of a cause of action will not do." *Id.* (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Moreover, a court need not accept inferences drawn by a plaintiff if they are unsupported by the facts as explained in the complaint. *See California Pub. Employee Ret Sys. v. The Chubb Corp.*, 394 F.3d 126, 143 (3d Cir. 2004) (citing *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997)). Nor must the Court accept legal conclusions disguised as factual allegations. *See Twombly*, 550 U.S. at 555; *McTernan v. City of York Pennsylvania,* 577 F.3d 521, 531 (3d Cir. 2009) ("The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.").

Expounding on the *Twombly/Iqbal* line of cases, the Third Circuit has articulated the following three-step approach:

> First, the court must 'tak[e] note of the elements a plaintiff must plead to state a claim.' Second, the court should identify allegations that, 'because they are no more than conclusions, are not entitled to the assumption of truth.' Finally, 'where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.'

Burtch v. Milberg Factors, Inc., 662 F.3d 212, 221 (3d Cir. 2011) (emphasis added) (quoting *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (3d Cir. 2010)). *See also Ceasar v. Varner*, 2022 WL 9491877, at *2 (W.D. Pa. Oct. 14, 2022). This determination is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

Finally, because Plummer is proceeding pro se, the allegations in the complaint must be held to "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520-521 (1972). *See also Sause v. Bauer*, 585 U.S. ---, 138 S. Ct. 2561, 2563

(2018). If the court can reasonably read a pro se litigant's pleadings to state a valid claim upon which relief could be granted, it should do so despite the litigant's failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or unfamiliarity with pleading requirements. *See Boag v. MacDougall*, 454 U.S. 364 (1982); *United States ex rel. Montgomery v. Bierley*, 141 F.2d 552, 555 (3d Cir. 1969) (petition prepared by a prisoner may be inartfully drawn and should be read "with a measure of tolerance").

B. Motions for Summary Judgment

As noted above, Defendant Wecht has moved for summary judgment. The standard for resolving such motions is well-known. Federal Rule of Civil Procedure 56(a) requires the court to enter summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Under this standard "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A disputed fact is "material" if proof of its existence or nonexistence would affect the outcome of the case under applicable substantive law. *Anderson*, 477 U.S. at 248; *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1078 (3d Cir. 1992). An issue of material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 257; *Brenner v. Local 514, United Bhd. of Carpenters and Joiners of Am.*, 927 F.2d 1283, 1287-88 (3d Cir. 1991).

When determining whether a genuine issue of material fact remains for trial, the court must view the record and all reasonable inferences to be drawn therefrom in favor of the nonmoving party. *Moore v. Tartler*, 986 F.2d 682 (3d Cir. 1993); *Clement v. Consol. Rail Corp.*,

963 F.2d 599, 600 (3d Cir. 1992); *White v. Westinghouse Electric Co.*, 862 F.2d 56, 59 (3d Cir. 1988). To avoid summary judgment, however, the nonmoving party may not rest on the unsubstantiated allegations of his or her pleadings. Instead, once the movant satisfies its burden of identifying evidence that demonstrates the absence of a genuine issue of material fact, the nonmoving party must go beyond his pleadings with affidavits, depositions, answers to interrogatories or other record evidence to demonstrate specific material facts that give rise to a genuine issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

Further, under Rule 56, a defendant may seek summary judgment by pointing to the absence of a genuine fact issue on one or more essential claim elements. The Rule mandates summary judgment if the plaintiff then fails to make a sufficient showing on each of those elements. When Rule 56 shifts the burden of production to the nonmoving party, "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323. *See Harter v. G.A.F. Corp.*, 967 F.2d 846, 851 (3d Cir. 1992).

IV. Discussion and Analysis: the Federal Claims

Plummer brings and Eighth Amendment claims pursuant to 42 U.S.C. § 1983 and a state law medical negligence claim. The federal claim will be reviewed first. Count I of the Amended Complaint broadly alleges that all Defendants violated his rights under the Eighth Amendment to be free from cruel and unusual punishment through their deliberate indifference to his serious medical needs. *See* ECF No. 68, ¶¶ 148-150. He seeks redress of this violation under § 1983. "Section 1983 is not a source of substantive rights," but is merely a means through which "to vindicate violations of federal law committed by state actors." *See Pappas v. City of Lebanon,*

331 F. Supp. 2d 311, 315 (M.D. Pa. 2004) (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284-85 (2002)).

"Section 1983 imposes civil liability upon any person who, acting under color of state law, deprives another individual of any rights, privileges, or immunities secured by the Constitution or laws of the United States." *Shuman v. Penn Manor Sch. Dist.*, 422 F.3d 141, 146 (3d Cir. 2005). Thus, a plaintiff asserting a claim under § 1983 must allege facts to show two fundamental elements: (1) a deprivation of a federally protected right that was (2) committed by a person acting under color of state law. *See Woloszyn v. Cty. of Lawrence*, 396 F.3d 314, 319 (3d Cir. 2005). In addition, a plaintiff must plead the personal involvement of each individual defendant because "individual liability [under § 1983] can be imposed only if the state actor played an 'affirmative part' in the alleged misconduct, either through personal direction of or actual knowledge and acquiescence in the deprivation." *Monche v. Grill*, 2022 WL 15523082, at *11 (M.D. Pa. Oct. 27, 2022) (citation omitted). A plaintiff's "mere hypothesis that an individual defendant had personal knowledge of or involvement in depriving the plaintiff of his rights" does not establish that defendant's personal involvement. *Id.*

Eighth Amendment deliberate indifference to medical care claims brought under § 1983 have their own unique elements that must be supported by the facts alleged in the complaint. For the delay or denial of medical care to rise to a violation of the Eighth Amendment's prohibition against cruel and unusual punishment, the facts must demonstrate "(1) that defendants were deliberately indifferent to [the inmate's] medical needs and (2) that those needs were serious." *Rouse v. Plantier*, 182 F.3d 192, 197 (3d Cir. 1999). Deliberate indifference requires proof that the official "knows of and disregards an excessive risk to inmate health or safety." *Natale v. Camden Cnty. Corr. Facility*, 318 F.3d 575, 582 (3d Cir. 2003) (quoting *Farmer v. Brennan*, 511

U.S. 825, 837 (1994)). Deliberate indifference has been found where a prison official: "(1) knows of a prisoner's need for medical treatment but intentionally refuses to provide it; (2) delays necessary medical treatment based on a nonmedical reason; or (3) prevents a prisoner from receiving needed or recommended treatment." *Rouse*, 182 F.3d at 197.

However, deference is given to prison medical authorities in the diagnosis and treatment of patients, and courts "disavow any attempt to second-guess the propriety or adequacy of a particular course of treatment ... (which) remains a question of sound professional judgment." *Inmates of Allegheny Cnty. Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979) (quoting *Bowring v. Godwin*, 551 F.2d 44, 48 (4th Cir. 1977)). That is to say, mere disagreements as to the proper medical treatment do not support a claim of deliberate indifference under the Eighth Amendment. *Monmouth Cty. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d. 326, 346 (3d Cir. 1987). Similarly, allegations of negligent treatment or medical malpractice do not trigger constitutional protections. *Estelle v. Gamble,* 429 U.S. (1976); *see also Pierce v. Pitkins*, 520 Fed. Appx. 64, 66 (3d Cir. 2013). Deliberate indifference can also be found "where the prison official persists in a course of treatment in the face of resultant pain and risk of permanent injury." *See McCluskey v. Vincent*, 505 Fed. Appx. 199, 202 (3d Cir. 2012) (internal quotation marks and citation omitted). "A medical need is serious if it 'has been diagnosed by a physician as requiring treatment,' or if it 'is so obvious that a lay person would easily recognize the necessity for a doctor's attention.'" *See Mitchell v. Beard*, 492 Fed. Appx. 230, 236 (3d Cir. 2012) (quoting *Atkinson v. Taylor*, 316 F.3d 257, 272-73 (3d Cir. 2003) (additional citation omitted).

The seriousness of Plummer's condition is assumed. It is generally recognized that back pain can be particularly painful, debilitating, and pernicious to resolve. However, the averments contained in Plummer's Amended Complaint and its supplement reveal that he received

significant medical care for his condition. Thus, the question before the Court is whether that care, to the varying extent provided by each Defendant, exhibited deliberate indifference to his serious medical condition.

A. The DOC Defendants' Motion to Dismiss should be granted and Plummer's claims against those defendants should be dismissed with prejudice.

The DOC Defendants raise arguments that are specific to each DOC Defendant in support of their motion to dismiss at ECF No. 127.

1. Plummer fails to state a claim against Defendant Silva.

In his Amended Complaint, Plummer identifies "Director of Health Services Joseph Silva" as a Defendant. *See* ECF No. 68, p. 1. Silva is listed in the caption of the Amended Complaint and mentioned again in its "Prayer for Relief. (*id.*, pp. 1, 19, ¶ 2), but nowhere else. The same is true in Plummer's Supplement: Silva is mentioned in the caption and again in connection to the relief sought but nowhere else in the document. *See* ECF No. 147, p 1; p. 21, ¶ 2. Because a named defendant must be shown through the complaint's allegations to have been personally involved in the events or occurrences on which a plaintiff's claims are based, and because Plummer's pleadings lack any averments of fact concerning Defendant Silva, he is entitled to dismissal. *See, e.g., Ortiz v. Alexander*, 2021 WL 1093633, at *7 (M.D. Pa. Mar. 22, 2021); *Atanacio-Reyes v. Durand*, 2021 WL 799423, at *4 (W.D. Pa. Feb. 8, 2021).

2. Plummer fails to state a claim against Defendants Overmeyer, Oberlander, Varner, and Moore.

Next, Plummer attempts to bring claims against three Defendants based on their involvement in the DOC's grievance process. Plummer identifies Overmeyer as "the Superintendent of SCI Forest who responded to several inmate grievances submitted by Mr.

Plummer between 2015 and 2020" and Oberlander as "the current Superintendent at SCI Forest who replaced Supt. Overmeyer and who responded to several inmate grievances submitted by Mr. Plummer." ECF No. 68, ¶¶ 18-19. He alleges that Varner "is the Chief Grievance Officer who oversees all final grievances" *Id.*, ¶ 20. According to the Amended Complaint, Moore is "an assistant for the Chief Grievance officer who oversaw and signed off on several final grievances." *Id.*, ¶ 21. No other allegations are made against these Defendants.

Thus, Plummer's claims against these four Defendants are based solely on their participation in the DOC's grievance process. Such claims are not viable because "participation in the grievance process does not, without more, establish involvement in the underlying constitutional violation." *Pumba v. Miller*, 2022 WL 11804036, at *6 (E.D. Pa. Oct. 20, 2022) (citing *Curtis v. Wetzel*, 763 Fed. Appx. 259, 263 (3d Cir. 2019) ("The District Court properly determined that Defendants ... who participated only in the denial of [the plaintiff's] grievances—lacked the requisite personal involvement [in the conduct at issue]."). Therefore, the claims against Overmeyer, Oberlander, Varner, and Moore should be dismissed.

, 3. Plummer fails to state a claim against Defendant Essono.

According to Plummer, Essono is "a nurse at SCI Forest who participated in the assessment of Mr. Plummer." ECF No. 68, ¶ 17. Essono is not mentioned in the remainder of the Amended Complaint. Plummer's Supplement, however, states additional allegations against her:

> On November 26, 2021, the plaintiff was seen by CRNP Jean Essono, at a sick call appointment for the severe pain in Mr. Plummer's lower back. CRNP Essono, also an employee at SCI Forest medical department was in possession of the plaintiff's medical records and knew that Mr. Plummer suffered from osteoarthritis, degenerative disc disease, two herniated discs, spinal

> stenosis and various diagnosis of nerve root compression and instead of CRNP Essono putting in a consult for Mr. Plummer to see a different Neurosurgeon or an Orthopedic surgeon, due to the contradiction in Dr. Wecht's finding of "no evidence of new root compression" when the MRI report from 1/24/2020, clearly states that the L3-L4, nerve root compression, CRNP Essono, intentionally ignored clinical signs of Mr. Plummer's sufferings.

ECF No. 147, ¶ 140. In essence, Plummer claims that upon assessing his condition, Essono was deliberately indifferent in failing to refer him to an outside neurologist or orthopedist. This allegation is insufficient to state a constitutional claim.

The Court of Appeals recently explained that:

> to succeed on an Eighth Amendment claim for inadequate medical care, "a plaintiff must make (1) a subjective showing that 'the defendants were deliberately indifferent to [his or her] medical needs' and (2) an objective showing that 'those needs were serious.'" *Pearson v. Prison Health Serv.*, 850 F.3d 526, 534 (3d Cir. 2017) (alteration in original) (quoting *Rouse v. Plantier*, 182 F.3d 192, 197 (3d Cir. 1999)). Prison officials can "act deliberately indifferent to a prisoner's serious medical needs by 'intentionally denying or delaying access to medical care or interfering with the treatment once prescribed.'" *Id.* (quoting *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976)). However, "mere disagreement as to the proper medical treatment" is insufficient to support an Eighth Amendment claim. *Monmouth Cnty. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 346 (3d Cir. 1987).

Williams v. Clark, 2022 WL 1402052, at *2 (3d Cir. May 4, 2022). Here, Plummer asserts only his disagreement with Essono's decision not to provide a referral to another physician, despite her awareness of his condition. That is not an allegation of deliberate indifference. *See Pearson*, 850 F.3d at 535 ("[M]ere disagreement as to the proper medical treatment does not support a claim of an eighth amendment violation.") (quoting *Monmouth Cty. Corr. Inst.*, 834 F.2d at 346). "[T]here is a critical difference between cases where the complaint alleges a complete denial of medical care and those alleging inadequate medical treatment." *United States ex rel. Walker v.*

Fayette Cty., 599 F.2d 573, 575 n.2 (3d Cir. 1979). Additionally, although deliberate indifference can be demonstrated by a defendant's intentional delay or denial of access to medical care for non-medical reasons, Plummer has not made any allegation that Essono declined or delayed referring him to an outside specialist for non-medical reasons. *See Estelle*, 429 U.S. at 103-105; *Pearson*, 850 F.3d at 537. The allegation that Essono "assessed" Plummer during a "sick call" appointment is one of responsiveness to Plummer's medical needs, not an denial or delay thereof. *See, e.g., Robinson v. Corizon Health, Inc.*, 2019 WL 448900, *9 (E.D. Pa. Feb. 5, 2019) (allegations of denial of medical care were actually indications of defendant's responsiveness to medical concerns).

Accordingly, Plummer's deliberate indifference claims against Essono should be dismissed.

4. Plummer's claims against Defendants Smith and Prinkey should be dismissed.

Plummer's Amended Complaint alleges that Smith "is the Correctional Health Care Administrator at SCI Forest." ECF No. 68, ¶ 11. Prinkey is identified as "the Registered Nurse Supervisor at SCI Forest." *Id.*, ¶ 12. Specific allegations against these two defendants are sparse and require some sorting.

Starting with Smith, the Court observes that, although identified as a defendant, neither the Amended Complaint nor its Supplement states any factual allegations against her beyond noting her position as "Correctional Health Care Administrator." *Id.*, ¶ 11; *see also* ECF No. 147, ¶ 11. This failure to allege sufficient facts, to state plausible claims, and/or to identify specific constitutional violations leaves Smith with no meaningful information as to the nature of Plummer's claims against her and violates Federal Rule of Civil Procedure 8. *See, e.g., Garrett*

v. Wexford Health, 938 F.3d 69, 91 (3d Cir. 2019) (noting that under Rule 8, a pleading cannot be "so vague or ambiguous that a defendant cannot reasonably be expected to respond."). Identifying Smith's position or title is insufficient to support her personal involvement in the alleged wrongs Plummer alleges in his pleadings. As noted, a defendant in a § 1983 action "must have personal involvement in the alleged wrongs to be liable and cannot be held responsible for a constitutional violation which he or she neither participated in nor approved." *Saisi v. Murray*, 822 Fed. Appx. 47, 48 (3d Cir. 2020) (quoting *Baraka v. McGreevey*, 481 F.3d 187, 210 (3d Cir. 2007) (citations removed)). It is Plummer's burden to "show that each and every defendant was 'personal[ly] involve[d]' in depriving him of his rights." *Kirk v. Roan*, 2006 WL 2645154, at *3 (M.D. Pa. Sept. 14, 2006) (quoting *Evancho v. Fischer*, 423 F.3d 347, 353 (3d Cir. 2006)). Allegations that broadly implicate a defendant without delineating individual conduct are legally insufficient. *See Van Tassel v. Piccione*, 608 Fed. Appx. 66, 69-70 (3d Cir. 2015). *See also Trainor v Wellpath*, 2021 WL 3913970, at *7 (W.D. Pa. Sept. 1, 2021).

As to Prinkey, Plummer's Amended Complaint does contain a bit more. Prinkey is identified as the "Registered Nurse Supervisor" at SCI-Forest. ECF No. 68, ¶ 12. He alleges, for example, that Prinkey responded to Plummer's "complaints that he was not receiving adequate medical attention." *Id.* ¶ 81. Plummer further pleads that "On 12-3-2015 ... Prinkey advised Plummer to purchase Ibuprofen, Actaminphenl ("Tylenol"), or muscle rub from the prison's commissary." ECF No. 68. ¶ 71. Then, on June 23, 2016, Plummer alleges that Prinkey stated "the MRI of the lumber (sic) spine of February 2010, showed minimal central stenosis at L3-L4 of the spine, but because the osteophytes (bone spurs) at this level predominate on the right side, a moderate to severe right foraminal encroachment on the spinal nerves exists,

resulting in numbness and tingling and some weakness in the lower extremities." *Id.*, ¶ 81. Plummer then claims that, together with Defendant Maxa, Prinkey determined "there is no indication further testing or consultation is needed." *Id.*, ¶ 87.

Two claims can be inferred from these allegations. First, Plummer's reference to Prinkey's responding to his "complaints" constitutes an attempt to impose liability based on Prinkey's involvement in responding to Plummer's grievances. Such a claim fails because "the filing of a grievance is not sufficient to show the actual knowledge necessary for a defendant to be found personally involved in the alleged unlawful conduct." *Trainor v. Wellpath*, 2021 WL 3913970, at *9 (W.D. Pa. Sept. 1, 2021); s*ee also Stuart v. Lisiak*, 645 Fed. Appx. 197, 200 (3d Cir. 2016) (holding that a prison nurse lacked personal involvement when she declined to intervene in an inmate's treatment, despite receiving the inmate's grievance claiming that the treatment was deficient); *Mincy v. Chmielsewski*, 508 Fed. Appx. 99, 104 (3d Cir. 2013) ("[A]n officer's review of, or failure to investigate, an inmate's grievances generally does not satisfy the requisite personal involvement."). Courts have routinely dismissed civil rights claims under § 1983 against prison officials whose only knowledge of the alleged violation stemmed from their participation in the grievance process. *See, e.g., Hoopsick v. Oberlander*, 2020 WL 5798044, at *2 (W.D. Pa. Sept. 29, 2020) (defendant upholding denial of plaintiff's grievance); *Beale v. Wetzel*, 2015 WL 2449622, at *5 (W.D. Pa. May 21, 2015) (senior prison officials' participation in administrative appeal process); *Rogers v. United States*, 696 F. Supp. 2d 472, 488 (W.D. Pa. 2010) (no personal involvement under § 1983 "[i]f a grievance official's only involvement is investigating and/or ruling on an inmate's grievance after the incident giving rise to the grievance has already occurred."). Likewise, in this case, Plummer's claim against Prinkey fails to the extent it is based on the Prinkey's involvement in the grievance process.

Second, Plummer's allegation that Prinkey determined no "further testing or consultation is needed" could be interpreted as a claim of deliberate indifference under the Eighth Amendment. Again, as pleaded, this claim fails. Although not entirely clear, Plummer appears to allege that his medical care should have been handled differently. *See, e.g., Liz v. Pa. Dept. Corr.*, 2022 WL 4120264, at *7 (E.D. Pa. Sept. 9, 2022) (plaintiff's complaint appears to allege his different opinion as to his medical care). However, a difference of opinion as to the proper medical care does not constitute deliberate indifference. *See Lenhart v. Pennsylvania*, 528 Fed. Appx. 111, 115 (3d Cir. 2013) (stating that mere disagreement as to proper medical care do not raise a constitutional claim). That is, when a prisoner receives some medical care and a dispute arises about the adequacy of such treatment, "district courts should not second guess medical judgments and ... constitutionalize claims which sound in tort law." *U.S. ex rel. Walker v. Fayette Cty. Pa.*, 599 F.2d 573, 575 n.2 (3d Cir. 1979) (citation omitted). And particularly on point for Plummer's allegations against this Defendant, "the question whether 'additional diagnostic techniques or forms of treatment ... [are necessary] is a classic example of a matter for medical judgment ... and does not represent cruel and unusual punishment' under the Eighth Amendment. *Liz*, 2022 WL 4120264 at *7 (quoting *McCluskey v. Vincent*, 505 Fed. Appx. 199, 203 (3d Cir. 2012) (internal quotation marks omitted). Accordingly Plummer's purported Eighth Amendment claim against Prinkey should be dismissed.

B. The Medical Defendants Motion to Dismiss should be granted and Plummer's claims against those Defendants should be dismissed with prejudice.

The Medical Defendants have moved to dismiss Plummer's claims against them or in the alternative, for summary judgment. *See* ECF No. 109. They raise several grounds for relief, including that many of Plummer's claims are barred by the statute of limitations, that he has

failed to allege facts sufficient to state a claim under the Eighth Amendment, that he failed to allege facts to support a *Monell* claim against Wellpath/Correct Care, and that Plummer has failed to exhaust his administrative remedies as to any claim against Eisenberg. *See* ECF No. 110, *generally*.

1. Plummer fails to allege facts to support a *Monell* claim against Corporate Defendants Wellpath and Correct Care.

Plummer attempts to state *Monell* claim against Wellpath and Correct Care. That is, he seeks to hold these corporate organizations liable for civil rights violations. *See, e.g., Dixon v. Pennsylvania Dep't Corr.*, 2022 WL 3330142, at *7 (M.D. Pa. Aug. 11, 2022). The standards for doing so are "both exacting and well-settled." *Id.* In *Monell v. Dep't of Social Services*, the Supreme Court held that a municipality could be liable under Section 1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts many fairly be said to represent official policy, inflicts injury that the government as an entity is responsible ...." 436 U.S. 658, 694 (1978).

Private corporations like Wellpath and Correct Care, which provide medical services under a contract with the DOC, may also be found liable under Section 1983. *See, e.g., Natale v. Camden Cnty. Corr. Facility*, 318 F.3d 575, 581 n.4, 583 (3d Cir. 2003) ("*Monell* applies to other private organizations faced with liability under § 1983."). But such private corporations may only be liable under *Monell* if they had a policy or custom causing its agents to deprive care to the level of a constitutional violation. *Johnson v. City of Philadelphia*, 975 F.3d 394, 403 (3d Cir. 2020) (citation omitted). Thus, there are two ways Plummer could hold Wellpath and Correct Care liable: he must allege either that these Defendants maintained a policy or custom which led to his constitutional injury, or that they failed to train, supervise, or discipline their

employees "reflect[ing] a deliberate or conscious choice" that caused his constitutional injury. *Forrest v. Parry*, 930 F.3d 93, 105 (3d Cir. 2019) (citations omitted). Plummer's Amended Complaint fails to allege facts to support either theory.

The Amended Complaint alleges that medical treatment was "withheld ... for non-medical reasons, such as to evade cost associated with providing adequate treatment." ECF No. 68, ¶ 70. In support, he alleges that Defendant Eisenberg told him that the medical department at SCI-Forest "will do all they can to avoid paying for surgery." *Id.*, ¶ 79. Plummer claims that Wellpath and Correct care had a policy of managing his pain in a manner that is "noneffective" and designed to favor the "least costly course of treatment." *Id.*, ¶ 137.

Under the first theory, Plummer must allege an "official proclamation, policy or edict by a decision maker possessing final authority to establish municipal policy" or any "given course of conduct so well-settled and permanent as to virtually constitute law." *Forrest*, 930 F.3d at 105-106. The second theory requires Plummer to allege that Wellpath and Correct Care's "failure or inadequacy" amounted to deliberate indifference under the Eighth Amendment. *Id.* at 106. Both of these theories require the identification of a final policy maker. *See Presbury v. Correct Care Solutions, Inc.*, 2022 WL 1787333, at *6 (E.D. Pa. May 31, 2022). Here, Plummer's Amended Complaint fails to identify any final policy maker, let alone any policy, that directly caused his harm. His conclusory and unsupported allegations that these corporate defendants had a policy of "cost savings" or "cost containment," without more, are insufficient to state a claim for *Monell* liability. Thus, to the extent Plummer's Amended Complaint asserts a *Monell* claim, it is recommend that such a claim be dismissed.

2. The claims against Medical Defendants Maxa, Eisenberg, Leslie, and Sutherland should be dismissed as barred by the applicable statute of limitations.

The Medical Defendants next argue that Plummer's claims should be dismissed because they are facially barred by the statute of limitations. *See* ECF No. 110, pp. 15-18. The statute of limitations is typically an affirmative defense raised in an answer to a complaint, not in a motion to dismiss. *See* Federal Rule of Civil Procedure 8(c)(1). In this Circuit, however, a statute of limitations defense can be raised in a motion to dismiss brought under Fed. R. Civ. P. 12(b)(6) if on the face of the complaint the claims have not been brought within the appropriate period of time. *See Silla v. Holdings Acquisition Co. LP*, 2021 WL 4206169, at *1 (3d Cir. 2021) (quoting *Robinson v. Johnson*, 313 F.3d 128, 135 (3d Cir. 2002)). Claims brought pursuant to 42 U.S.C. § 1983 are subject to the most analogous state statute of limitations, which in Pennsylvania is the two-year statute of limitations for personal injury actions. *See Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985); *Urrutia v. Harrisburg County Police Dept.*, 91 F.3d 451, 457 n. 9 (3d Cir. 1996) (citing 42 Pa. C.S. § 5524). *See also Wallace v. Kato*, 549 U.S. 384 (2007) (for § 1983 claims, "the length of the statute of limitations ... is that which the State provides for personal-injury torts.") (citing *Owens v. Okure*, 488 U.S. 235, 249-50 (1989) (in each state, § 1983 claims are governed by the state's "general or residual statute for personal injury actions")). A cause of action accrues for statute of limitations purposes when the plaintiff knows or has reason to know of the injury that constitutes the basis of the cause of action. *Sameric Corp. of Delaware. Inc. v. City of Philadelphia*, 142 F.3d 582, 599 (3d Cir. 1998); *see also Nelson v. County of Allegheny*, 60 F.3d 1010 (3d Cir. 1995). "The determination of the time at which a claim accrues is an objective inquiry," concerned with "what a reasonable person should have known." *Kach v. Hose*, 589 F.3d 626, 634 (3d Cir. 2009). According to the prison mailbox rule, Plummer's original Complaint was filed on February 2, 2022, the date he signed it. *See* ECF No. 7; *see also Roten v. Klemm*, 2022 WL 2073044, at *3 (W.D. Pa. June 9, 2022) (applying prisoner mailbox

rule). Given this, the two-year statute of limitations bars any claims relating to events that predate February 2, 2020.

Plummer's Amended Complaint is replete with allegations of tortious conduct that occurred more than two years before he commenced this action. For example, Plummer's claims against Defendant Eisenberg are based on treatment he received in 2016. *See* ECF No. 68, ¶¶ 73-79. Defendant Maxa, according to the Amended Complaint, also treated Plummer in 2016, as well as in 2017 and between March of 2019, and January of 2020. *Id.*, ¶¶ 82, 85-87; 106, 129. Plummer makes allegations against Defendant Leslie that are premised on an interaction the two had in March of 2018 and against Defendant Sutherland from October of 2018. *Id.*, ¶¶ 111, 113. Thus Plummer did not commence his action within the two year limitations period applicable to his claims against the Medical Defendants. But this does not end the Court's inquiry

The statute of limitations for § 1983 actions is tolled while the prisoner exhausts the administrative remedies available to him because such exhaustion is mandatory under the Prison Litigation Reform Act. *Wisniewski v. Fisher*, 857 F.3d 152, 158 (3d Cir. 2017) (citing *Pearson v. Sec'y Dep't of Corr.*, 775 F.3d 598, 603 (3d Cir. 2015)). A plaintiff is not deemed to have exhausted his administrative remedies until a final appeal decision on his grievance. *See Fennell v. Cambria Cty. Prison*, 607 Fed. Appx. 145, 149 (3d Cir. 2015) ("proper exhaustion" means a prisoner's completion of the administrative review process). Thus, the statute of limitations on Plummer's claims was tolled until any appeal taken from the denial of his grievance was concluded. *See Major v. Halligan*, 2021 WL 6283944, at *6 (W.D. Pa. Nov. 17, 2021). Plummer avers that he "has exhausted the inmate grievance system regarding the above mentioned matters ...." *Id.*, ¶ 147.

The Medical Defendants have attached Plummer's grievance record to their motion. *See* ECF No. 110-1. A review of Plummer's grievance history informs this analysis and is summarized as follows:

Grievance Number	Date Filed	Date Resolved (SOIGA)	Defendant(s) or Persons Implicated	Number of Elapsed Days
635648	Feb. 24, 2016	Feb. 1, 2017	McKeel, Maxa	343 days
666852	Mar. 1, 2017	June 9, 2017	Williamson	100 days
672646	April 6, 2017	July 10, 2017	McKeel	96 days
679745	May 27, 2017	Sept. 8, 2017	Sutherland	105 days
682705	June 15, 2017	Dec. 13, 2017	Marlowe	182 days
683973	June 22, 2017	Dec. 13, 2017	Dr. List	175 days
719537	Feb. 1, 2018	June 20, 2018	Williams (sp? Williamson)	140 days
790330	Feb. 5, 2019	Sept. 19, 2019	Leslie	227 days
792813	Mar. 21, 2019	Aug. 30, 2019	Maxa, Lameroux	163 days
824909	Sept. 20, 2019	Dec. 16, 2019	Federko, "other doctors"	87 days
921481	Mar. 26, 2021	Aug. 27, 2021	Leslie	154 days
942253	Aug. 21, 2021	Mar. 21, 2022	Dellefiore Orthopedic	212 days
959152	Dec. 9, 2021	May 16, 2022	Essono	158 days
965787	Jan. 28, 2022	May 6, 2022	No individual(s) identified	98 days.

Demonstrably, several of these grievances fail to implicate any Medical Defendant. For example, although mentioned in grievances, McKeel, Marlowe, List, Lameroux, Federko, and Dellefiore Orthopedic are not defendants in this case. Thus, the pendency of those grievances do not toll the statute of limitations for claims against the Medical Defendants.

However, several of the grievances do implicate certain Defendants. The statute of limitations for any claim against Medical Defendant Maxa related to the events described in Grievance 635648 was tolled for 343 days. Accounting for this and assuming not time accrued on Plummer's claim against Maxa before he filed his grievance, the statute of limitations on that

claim expired on January 10, 2018. Maxa is also identified in Grievance 792813. The statute of limitations for claims stemming from that grievance was tolled for 163 days, meaning any lawsuit based on those events needed to be filed by February 9, 2020. Claims against Medical Defendant Sutherland related to the events set out in Grievance 679745 were tolled for 105 days. Accordingly, Plummer had to file any claims against Sutherland by December 22, 2017. Similarly, claims against Defendant Leslie should have been filed either by May 3, 2020, (relating to Grievance 790330) or by January 28, 2022 (relating to Grievance 921481). As noted above, Plummer filed his complaint against these Defendants on February 2, 2022. *See* ECF No. 7. Thus, his claims against Medical Defendants Maxa, Leslie, and Sutherland are barred by the two-year statute of limitations and should be dismissed.

This leaves Defendant Eisenberg. Upon review of the grievance record, it appears that Plummer did not grieve any actions or omissions relating to this Defendant. The Amended Complaint avers that Eisenberg denied Plummer's request for an MRI as being "too expensive" on February 11, 2016. *See* ECF No. 68, ¶¶ 73-74. Also, in March of 2016, Plummer faults Eisenberg for not permitting him to be seen by a neurologist or neurosurgeon. *Id.*, ¶¶ 75-76. And finally, Plummer charges that in June of 2016, Eisenberg directed him to purchase ibuprofen for his back pain and told Plummer that SCI-Forest would do all they could to avoid paying for surgery. *Id.*, ¶¶ 77-79. Nothing in the grievance record tolls Plummer's claims against Eisenberg. Therefore, he would have had to file an action against this defendant by June of 2018, at the latest. Given that his Complaint was not filed for another four years, any claims against Eisenberg are barred by the statute of limitations and should be dismissed.

Plummer argues in opposition that he did not know of his injury until he received some of his medical records on February 25, 2021. ECF No. 156, p. 8. Thus, he invokes the "discovery

rule" to further toll his claims and contends the statute of limitations began to run on that date. *Id.* This argument is misplaced. As noted previously, the statute of limitations for actions brought under 42 U.S.C. § 1983 is governed by the personal injury tort law of the state where the cause of action arose—in this case, Pennsylvania. *Kach*, 589 F.3d at 634. Under Pennsylvania law, a plaintiff must bring a § 1983 claim within two years of when that claim accrued. 42 Pa. Cons. Stat. § 5524(2). A §1983 claim accrues, and such a claim accrues "when the plaintiff knew or should have known of the injury upon which its action is based." *Kach*, 589 F.3d at 634 (quoting *Sameric Corp. v. City of Phila.*, 142 F.3d 582, 599 (3d Cir.1998)). More generally, a cause of action has accrued when "the last event necessary to complete the tort" takes place, "usually at the time the plaintiff suffers an injury." *Id.* Once an injury occurs and its cause is known (or is reasonably knowable), a cause of action accrues even if "the full extent of the injury is not known or predictable." *Id.* at 634–35; *see also Brown v. Beard*, 2014 WL 176579, at *1 (E.D. Pa. Jan. 16, 2014). Although the medical records may have provided more information as to the "full extent of the injury," Plummer acknowledges in his Amended Complaint that he began complaining about his medical treatment for that injury back in 2015, if not earlier.[2] *See, e.g.*, ECF No. 68, ¶71. Thus, it is not disputed that Plummer knew he was injured and knew the cause of his injury even though the full extent of his injuries "may not have been known or predictable at that time." *Brown*, 2014 WL 176579, at *1 (quoting *Karch*, 589 F.3d at 634035)). Because Plummer's filing of multiple grievances concerning the treatment he was receiving for his back condition confirms that he knew of his injury and believed it was caused or aggravated

[2] For example, a grievance provided by Plummer indicates that he complained of the treatment he was receiving for his back pain as far back as November 23, 2015. *See* ECF No. 156-3, p. 1. There, Plummer complained about the treatment he was receiving for his "bulging disc" and about "pain in my back, legs, and feet." *Id.* He stated that "this pain is getting to where every step I take I feel pain." *Id.* By way of relief, Plummer asked for "proper medical treatment," "surgery," and "thicker insoles or special sneakers to help with cushion." *Id.* The complaints contained in his 2015 grievance are similar, if not identical, to those he now raises in this action.

by the acts or omissions of medical personnel, his deliberate indifference claims against the Medical Defendants accrued before February 2, 2020, and Plummer did not file this action until February 2, 2022, this claim against them is barred by the statute of limitations.

3. The Continuing Violation Doctrine is inapplicable.

Plummer's Amended Complaint recounts in detail his continuing back pain and related problems; a condition that has persisted over many years. He argues that the "continuing violation doctrine"—a narrow and equitable exception to the statute of limitations—should apply here, thereby permitting Plummer to yet recover on these otherwise time-barred actions. *See, e.g.*, ECF No. 163, p. 2. The doctrine provides that "when a defendant's conduct is part of a continuing practice, an action is timely so long as the last act evidencing the continuing practice falls within the limitations period; in such an instance, the court will grant relief for the earlier related acts that would otherwise be time barred." *Brenner v. Loc.* 514, *United Bhd. of Carpenters & Joiners of Am.*, 927 F.2d 1283, 1295 (3d Cir. 1991). Here, this doctrine is potentially applicable because the claims against one Medical Defendant—Leslie—occurred within the two-year limitations period. *See* ECF No. 147, ¶ 139 (allegations against Leslie, dated March 20, 2021).

Courts apply a three-factor analysis to assess the application of the continuing violation doctrine to a defendant's alleged conduct:

> (1) subject matter jurisdiction-whether the violations constitute the same type of discrimination, tending to connect them in a continuing violation; (2) frequency-whether the acts are recurring or more in the nature of isolated incidents; and (3) degree of permanence-whether the act had a degree of permanence which should trigger the plaintiffs awareness of and duty to assert his/her rights ... ."

Cowell v. Palmer Twp., 263 F.3d 286, 292 (3d Cir. 2001). Additionally, the Court of Appeals for the Third Circuit has held that "in order to benefit from the doctrine, a plaintiff must establish that the defendant's conduct is 'more than the occurrence of isolated or sporadic acts.'" *Id.* (quoting *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 755 (3d Cir. 1995)). That is, the distinction between "continuing violations" and "discrete acts" must be carefully considered. *See O'Connor v. City of Newark*, 440 F.3d 125, 128 (3d Cir. 2006). If a plaintiff's claims are based on discrete acts which give rise to causes of action that can be brought individually, then the continuing violations doctrine does not serve to extend the applicable statute of limitations periods. *Id.* at 128–29. "[T]ime-barred claims cannot be resurrected by being aggregated and labeled continuing violations." *O'Connor*, 44 F.3d at 129. *See also Anders v. Bucks Cnty.*, 2014 WL 1924114, at *4 (E.D. Pa. May 12, 2014). Thus, the continuing violations doctrine applies when a defendant's actions are not individually actionable, but "only the cumulative effect of those acts creates a cause of action."[3] *Id.* In applying the doctrine to a § 1983 claim, the Supreme Court

> established a bright-line distinction between discrete acts, which are actionable, and acts which are not individually actionable but may be aggregated to make out a ... claim. The former must be raised within the applicable limitations period or they will not support a lawsuit. The latter can occur at any time so long as they are linked in a pattern of actions which continues into the applicable limitations period.

[3] "It is thus a doctrine not about a continuing, but about a cumulative, violation. A typical case is workplace harassment on grounds of sex. The first instance of a coworker's offensive words or actions may be too trivial to count as an actionable harassment, but if they continue they may eventually reach that level and then the entire series is actionable. If each harassing act had to be considered in isolation, there would be no claim even when by virtue of the cumulative effect of the acts it was plain that the plaintiff had suffered actionable harassment." 3 Sheldon H. Nahmod, Civil Rights & Civil Liberties Litigation: The Law of Section 1983 § 9:31 (2013). *See also Anders*, 2014 WL 1924114, at *4 n.4.

O'Connor, 440 F.3d at 127 (citing *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 105 (2002)).

Here, Plummer's § 1983 claim against the Medical Defendants could be considered an aggregation of the following actions: (1) Eisenberg's failure in 2016 to order an MRI and refusal to send Plummer to an outside specialist because it was "too expensive;" (2) Eisenberg's prescription of "over the counter" pain medication to treat Plummer's symptoms; (3) Maxa's determination that Plummer was showing "no signs of acute injury;" (4) Maxa's refusal to provide Plummer with a wheelchair in 2017; (5) Leslie's prescription of gabapentin in 2018; (6) Sutherland's prescription of prednisone in 2018; (7) Leslie's 2021 notice to Plummer that he would not be seen by an "arthritis expert" as recommended by Dr. Wecht; and (8) Essono's failure to act on Plummer's request to be seen by a neurosurgeon. *See* ECF No. 68, *generally*.

So aggregated, however, these amount to discrete, isolated events by separate defendants which are "not appropriately linked to some larger scheme to deny [Plummer] medical care." *See Ozoroski v. Maue*, 460 Fed. Appx. 94, 97 (3d Cir. Jan. 4, 2012). Put another way, Plummer's allegations concern sporadic, episodic, and varied treatment rendered periodically by various Medical Defendants. For example, Plummer's claim against Maxa is based on a consultation in July of 2016, wherein Plummer could not identify the "exact location of his pain," and a consultation a year later after Plummer fell. *See* ECF No. 68, ¶¶ 82, 86, 106. Further, Plummer filed grievances against Maxa in February of 2016. Maxa's conduct was thus "sufficiently permanent to trigger [Plummer's] awareness of and duty to assert his … rights." *Ozoroski*, 460 Fed. Appx. at 97 (citing *Cowell*, 263 F.3d at 292). Nevertheless, Plummer waited until 2022 to bring suit again Maxa.

Plummer's allegations against Defendant Eisenberg implicate treatment sessions that occurred in February, March, and June of 2016. *Id.*, ¶¶ 74, 76, and 77. No grievances were filed against Eisenberg and Plummer waited until 2022 to sue this Defendant. Leslie and Sutherland's involvement was also discrete, not occurring until years later—2018—and then, only on two distinct occasions. *See id.*, ¶¶ 111, 113. Plummer appears not to have grieved the actions or inactions of these Defendants. Instead, he waited four years to file suit against them.[4] Thus, Plummer's allegations against the Medical Defendants cannot be saved by the continuing violation doctrine and should be dismissed as untimely.

3. Alternatively, Plummer's allegations against the Medical Defendants fail to state a claim under the Eighth Amendment.

Alternatively, even if the Court were to conclude that Plummer's claims are not time barred, they fail to state a claim under the Eighth Amendment. As set out previously, Plummer received years of care, going back to February of 2016, when he saw Eisenberg for the first time. By Plummer's own admission, he was seen by the Medical Defendants, prescribed treatment and medication (both over-the-counter and prescription), given physical therapy, and referred to out-of-facility physicians. The years of medical history recounted in the Amended Complaint demonstrates substantial care. Where "a prisoner has received some amount of medical treatment, it is difficult to establish deliberate indifference, because prison officials are afforded considerable latitude in the diagnosis and treatment of prisoners." *Palakovic v. Wetzel*, 854 F.3d

[4] One lone allegation against Defendant Leslie falls within the applicable statute of limitations. Plummer contends that on March 20, 2021, he saw Leslie and that during the consultation, Leslie informed Plummer of the decision not to follow through with the recommendations made by Dr. Wecht. *See* ECF No. 147, ¶ 139. Although filed within the requisite two-year period, any Eighth Amendment claim based on this allegation fails. Plummer's allegation against Leslie amounts to nothing more than a difference of medical opinion, which is not actionable under the Eighth Amendment. Prisoners do not have the right to choose their medical treatment and their disagreement with a prison medical professional's judgment or a difference of medical opinion between two physicians does not amount to an Eighth Amendment violation because "there may ... be several acceptable ways to treat an illness." *See Lasko v. Watts*, 373 Fed. Appx. 196, 203 (3d Cir. 2010); *White v. Napoleon*, 897 F.2d 103, 110 (3d Cir. 1990).

209, 227 (3d Cir. 2017) (citing *Durmer v. O'Carroll*, 991 F.2d 64, 67 (3d Cir. 1993)). And Plummer's allegations that the Medical Defendants failed to follow the recommendations likewise does not state a claim of deliberate indifference. A prisoner's disagreement with the medical staff's professional judgment, or a difference of medical opinion between two physicians, does not state an Eighth Amendment claim. *White v. Napoleon*, 897 F.2d 103, 110 (3d Cir. 1990).

Thus, Plummer's claims against the Medical Defendants fail to state a violation of the Eighth Amendment and should be dismissed.

C. Section 1983 Claims Against Individual Defendants Wecht and Williamson

Doctors Wecht and Williamson have each moved to dismiss Plummer's claims against them. *See* ECF Nos. 84 (Wecht) and 105 (Williamson). Plummer identifies Williamson as "a Neurosurgeon who has several offices, including one located in Grove City and another in Mercer County, Pennsylvania. He participated in the assessment of Mr. Plummer." ECF No., 68, ¶ 15. Wecht is alleged to be a "Neurosurgeon who works for UPMC-Pittsburgh" who also assessed Plummer. *Id.*, ¶ 16. For the reasons stated below, these motions should be granted the claims against these Defendants should be dismissed.

1. The Eighth Amendment claims against Wecht and Williamson fail because neither is alleged to be a state actor, as required by Section 1983.

Only state actors can be subject to Section 1983 liability. *See* 42 U.S.C. § 1983; *Kach v. Hose*, 589 F.3d 626, 646 (3d Cir. 2009). Wecht and Williamson, as averred in the Amended Complaint, are private physicians; not employees of the DOC, Wellpath, or Correct Care.

Plummer alleges that he was seen at Williamson's Grove City, Pennsylvania, office; not at the prison. *See* ECF No. 68, ¶ 95. Plummer further pleads that Williamson acted more as an

outside, consultative physician who produced "reports" to the prison medical department. *See, e.g., id.* at ¶¶ 109, 118, 120, and 123. Thus, Williamson cannot be considered a state actor. Additionally, Plummer has not filed a response in opposition to Williamson's motion and, thus, the motion is unopposed. *See, e.g., Robison v. Sutter*, 2022 WL 2656793, at *2 (W.D. Pa. June 6, 2022), *report and recommendation adopted*, 2022 WL 2657214 (W.D. Pa. July 8, 2022); *see also Stackhouse v. Mazurkiewicz*, 951 F.2d 29, 30 (3d Cir. 1992) (explaining that if a party represented by counsel fails to oppose a motion to dismiss, the district court may treat the motion as unopposed and subject to dismissal without a merits analysis). Accordingly, Williamson's motion to dismiss is meritorious and apparently uncontested.

As to Wecht, the Amended Complaint specifically identifies him as an employee of UPMC-Pittsburgh; not the DOC or Wellpath/Correct Care. Thus, Plummer fails to allege any facts to support that Wecht is a state actor or that the private medical care he provided could be considered state action.[5] *See Kach,* 589 F.3d at 646; *Gotell v. Clarke*, 2021 WL 9037643, at *3 (W.D. Pa. July 26, 2021), *report and recommendation adopted as modified*, 2022 WL 1768945 (W.D. Pa. June 1, 2022). "Action taken by private entities with the mere approval or acquiescence of the State is not state action." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52

[5] In this response to Defendant Wecht's motion to dismiss (ECF No. 100), Plummer argues that Wecht "is in contract with the Pennsylvania Department of Corrections to provide medical service to prisoners housed in the Pennsylvania Department of Corrections." ECF No. 100, p. 1, ¶ 4. As noted above, neither the Amended Complaint nor the supplement filed months later, contain this new allegation. "A document filed pro se is to be liberally construed, and a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citations omitted). Nevertheless, the Court of Appeals for the Third Circuit has emphasized that a pro se filing, including a complaint, "may not be amended by briefs in opposition to a motion to dismiss." *Com. Of Pa. ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.3d 173, 181 (3d Cir. 1988); *see also Mala v. Crown Bay Marina Inc.*, 704 F.3d 239, 244 (3d Cir. 2013) (recognizing that although district courts must be "flexible when dealing with imprisoned pro se litigants," "[a]t the end of the day, they cannot flout procedural rules—they must abide by the same rules that apply to all other litigants."). Here, an earlier iteration of t Wecht's motion to dismiss raised the state actor argument. *See* ECF No. 40; ECF No. 41, p. 3. Plummer was afforded an opportunity to file an Amended Complaint after reviewing Wecht's motion and did so. *See* ECF No. 68. His amended pleading makes no mention of this alleged "contract" and he only mentions in it response to a renewed motion to dismiss by Wecht. Thus, this allegation, which Plummer raises only in his brief, will not be considered.

(1999) (citation omitted). Because Wecht is not alleged to be a state actor, any constitutional claims asserted against him must be dismissed. *See, e.g., Ollie v. Lubahn*, 2018 WL 10245776, at *2 (W.D. Pa. Nov. 9, 2018) (dismissing Eighth and Eleventh Amendment claims against UPMC and St. Vincent Hospital physicians because neither doctor is a state actor); *Massey v. Crady*, 2018 WL 4328002, at *6 (W.D. Pa. Aug. 8, 2018).

2. Plummer fails to state a conspiracy claim against Dr. Williamson.

One paragraph of the Amended Complaint appear to level a conspiracy allegation against Williamson. Plummer alleges that

> Defendant Dr. Williamson intentionally ignored clinical signs that Mr. Plummer was suffering from nerve root compression in a concerted effort to provide his expert opinion in conformity with the final goals of the defendant employed at SCI-Forest.

ECF No. 68, ¶ 118. He also contends that Williamson intentionally omitted medical findings from his report to benefit "Wellpath and the defendants employed at SCI Forest by avoiding a doctor's recommendation for surgery." *Id.*, ¶ 127. But Plummer has failed to plead any facts from which the existence of a conspiracy between Dr. Williamson and the other Defendants might be inferred.

Generally, in order "to properly plead an unconstitutional conspiracy, a plaintiff must assert facts [alleging] a conspiratorial agreement" between the non-state actors and the government. *Great W. Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 178 (3d Cir. 2010). Bare allegations that "[d]efendants engaged in a concerted action of a kind not likely to occur in the absence of agreement" are insufficient. *Id.* Here, Plummer's allegations of a conspiracy are both conclusory and, as discussed above, fail to implicate a state actor. Accordingly, this claim fails.

D. The Court should dismiss all claims with prejudice as further amendment would be futile.

In a civil rights case, when the Court grants a motion to dismiss for a failure to state a claim, the Court must offer the plaintiff leave to amend even if it was not requested by the plaintiff, "unless doing so would be inequitable or futile." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 246 (3d Cir. 2008); *Andrew v. Highmark Health*, 2022 WL 14672734, at *2 (W.D. Pa. Oct. 25, 2022) (citing *Phillips*). Beginning with the claims asserted against the DOC Defendants, it is recommended that Plummer not be given another opportunity to amend his claims. In addition to his original Complaint (ECF No. 7) and his Amended Complaint, Plummer has filed a lengthy supplement (ECF No. 145). Thus, he has had ample opportunity to augment his factual allegations to support his Eighth Amendment claim, but has repeatedly failed to do so. In addition, the extent of the care that Plummer acknowledges in his pleadings makes such a claim facially implausible. Thus, further amendment should not be permitted and the claims against the DOC Defendants should be dismissed with prejudice. *See, e.g., Woods v. Morris*, 2022 WL 11962108, at *6 (W.D. Pa. Oct. 20, 2022).

The claims against the Medical Defendants should likewise be dismissed with prejudice. Plummer's own recitation of his medical history demonstrates that his claims are barred by the applicable statute of limitations and thus, the lateness of these claims cannot be cured by further amendment. *See, e.g., Davis v. Allegheny Cnty. Court of Common Pleas*, 2022 WL 169504087, at *2 (W.D. Pa. Nov. 15, 2022).

Finally, the federal claims brought against Wecht and Williamson should also be dismissed with prejudice as any further attempt at amendment is futile. By Plummer's own acknowledgement, neither of these defendants are state actors and having so averred, any attempt

to cure this defect would be futile. *See, e.g., Miller v. Man*, 2022 WL 2082998, at *2 (E.D. Pa. Aug. 3, 2022).

V. Discussion and Analysis: the State Law Claims

In Count II of the Amended Complaint, Plummer raises a medical malpractice claim against all of the Defendants. *See* ECF No. 68, ¶¶ 151-156. He alleges that the Defendants "acted with negligence in repeatedly misdiagnosing Mr. Plummer and subsequently not treating or accommodating Mr. Plummer's nerve root compression appropriately." *Id.*, ¶ 152. This claim is brought under state law because negligence is not a federal constitutional standard. *See, e.g., Daniels v. Williams*, 474 U.S. 327, 328 (1986) (holding that official's mere negligence is not actionable under § 1983 because "the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property"). Although the Court may exercise supplemental jurisdiction over such state claims, *see* 28 U.S.C. § 1331; § 1367(c)(3), it is recommended that the Court decline to exercise that authority.

In an action that includes both federal and state law claims, and the federal claims have all been dismissed, Courts may decline to exercise supplemental jurisdiction. *See, e.g., Lundgren v. Ameristar Credit Solutions, Inc.*, 40 F.Supp.3d 543, 551-52 (W.D. Pa. 2014) (declining to exercise supplemental jurisdiction over state-law claims after granting summary judgment on federal claims); *Moore v. Dep't of Corr.*, 2022 WL 2240086, at *6 (E.D. Pa. June 22, 2022). Whether to exercise supplemental jurisdiction is within a federal court's discretion. *Kach v. Hose*, 589 F.3d 626, 650 (3d Cir. 2009). The decision is based on "the values of judicial economy, convenience, fairness, and comity." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988). When all federal claims have been dismissed, leaving only state-law claims for

consideration, "the balance of these factors indicates that these remaining claims properly belong in state court." *Id.*, 484 U.S. at 350.

Nothing in this case warrants the Court's exercise of jurisdiction over state law claims routinely addressed by state courts. Thus, the balance of the factors "point[s] toward declining to exercise jurisdiction over the remaining state law claims." *Id.*, at 350 n.7. Accordingly, it is recommended that the remaining state law medical malpractice/negligence claims be dismissed without prejudice. *See* 28 U.S.C. § 1367(c)(3). Plummer may refile his state law claims in the appropriate state court if he chooses to do so. *See, e.g., Williams v. City of Johnstown*, 2016 WL 1069100, at *7 (W.D. Pa. Mar. 17, 2016) (where federal claims have been dismissed, federal court declined to exercise supplemental jurisdiction over state-law claims and dismissed without prejudice to plaintiff refiling those claims in state court); *see also Hailey v. Wetzel*, 2021 WL 60514446, at *14 (W.D. Pa. Dec. 20, 2021) (citing *Williams*).[6]

VI. Conclusion

In summary, it is respectfully recommended as follows:

1. Defendant Wecht's motion to dismiss at ECF No. 84 be GRANTED and the claims against him be dismissed with prejudice.

2. Defendant Williamson's motion to dismiss at ECF No. 105 be GRANTED and the claims against him be dismissed with prejudice.

3. The Medical Defendants' motion to dismiss at ECF No. 109 be GRANTED and the claims against those Defendants be dismissed with prejudice.

[6] Finally, and given this recommendation, the motion for summary judgment on the state-law claims filed by Defendant Wecht should be dismissed as moot. *See* ECF No. 143.

4. The DOC Defendants' motion to dismiss at ECF No. 121 be GRANTED and the claims against those Defendants be dismissed with prejudice.

5. The Court decline to exercise supplemental jurisdiction over the state-law negligence/malpractice claims and dismiss those claims against all Defendants without prejudice to Plummer refiling those claims in state court.

6. Defendant Wecht's motion for summary judgment on the state-law claim be dismissed as moot.

VII. Notice Regarding Objection to this Report

In accordance with 28 U.S.C. §636(b)(1) and Fed. R. Civ. P. 72, the parties must seek review by the district court by filing Objections to the Report and Recommendation within fourteen (14) days of the filing of this Report and Recommendation. Any party opposing the Objections shall have fourteen (14) days from the date of service of the Objections to respond thereto. *See* Fed. R. Civ. P. 72(b)(2). Failure to file timely objections may constitute a waiver of appellate rights. *See Brightwell v. Lehman*, 637 F.3d 187, 193 n.7 (3d Cir. 2011); *Nara v. Frank*, 488 F.3d 187 (3d Cir. 2007).

DATED this 3rd day of January, 2023.

BY THE COURT:

RICHARD A. LANZILLO
CHIEF UNITED STATES MAGISTRATE JUDGE

VERICATION

I, MR. PLUMMER, VERIFIES THAT ALL STATEMENTS HEREIN ARE TRUE & CORRECT & THAT ANY FALSE STATEMENTS SUBJECT ME TO THE THE PENALTIES OF PERJURY.

11/16/23

William Plummer
LZ2255
SCI ALBION
10745 Route 18
ALBION, PA. 16475